MENSTRUATION, MENOPAUSE, AND THE PREGNANT WORKERS FAIRNESS ACT

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Abstract

Some workplaces are extraordinarily inhospitable to menstruators, especially those in low-wage jobs. Workers have been denied restroom breaks and then harassed or fired after menstrual blood leaked onto their clothes or their employer's property. Employers routinely refuse to provide accommodations for menopause symptoms or time off for menstruation-related medical care. The failure to support menstruators is a significant barrier to ensuring workplace equality.

This Article explains how federal laws, including the landmark Pregnant Workers Fairness Act (PWFA), can—and should—be interpreted to help address these inequities. PWFA requires employers to provide "reasonable accommodations" for "pregnancy, childbirth, or related medical conditions." Menstruation is a necessary precondition for pregnancy, menstrual disorders are a common cause of infertility, and menopause may be triggered by treatments for complications during pregnancy or childbirth.

In its 2024 regulations implementing PWFA, the Equal Employment Opportunity Commission (EEOC) confirms that menstruation can be within the ambit of the statutory language. This is the first *federal regulation that explicitly requires accommodation of menstruation-related needs. In interpreting PWFA, and in separate guidance on harassment, the EEOC also clarifies that failure to support menstruators can violate general prohibitions on sex-based discrimination; recent guidance from the Departments of Education and Labor makes the same point.*

This Article provides practical advice on implementing PWFA to address menstruation-related needs, while minimizing the risk of backlash against menstruators. It also urges more effective enforcement of general workplace laws addressing employee health that could reduce the need for menstruators

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to ask for "special treatment"—and improve workplace conditions for all *workers. However, existing legal protections leave some important gaps. Thus, this Article calls for research-informed policy changes to ensure that workers can manage menstruation and the transition to menopause with dignity.*

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Introduction

Once only whispered about in bathrooms and health classes, menstruation is finally in the spotlight. The menstrual cycle, from menarche to menopause, has become a focus of attention in the popular press, on bookstore shelves, and in the entertainment world. Recently, the *New York Times* has published an interactive quiz to test knowledge of the menstrual cycle, explored how menstruation and menopause impact sleep, and highlighted workplace menopause policies.[1] *The New Yorker*, *Time*, and other general interest

[1] Melinda Wenner Moyer, *Do Women Need More Sleep Than Men?*, N.Y. Times (Feb. 25, 2025), https://www.nytimes.com/2025/02/18/well/sleep-needs-for-women-versus-men.html [https://perma.cc/KT77-BHUQ]; Alisha Haridasani Gupta, *How Much Do You Know About the Menstrual Cycle*, N.Y. Times (June 22, 2023), https://www.nytimes.com/interactive/2023/06/22/well/live/period-menstruation-quiz.html [https://perma.cc/

magazines have similarly run stories on menstrual health, menstrual-friendly workplaces, and menopause.[2] Several new books seek to demystify and destigmatize the subject.[3] Menstruation and menopause are openly discussed in film[4] and television,[5] including in Super Bowl ads[6] and coverage of the 2024 Paris Olympics.[7] Celebrities, including Oprah Winfrey,[8] Gabrielle Union,[9]

N5N8-A72X]; Sharon Otterman, *A Movement to Make Workplaces 'Menopause Friendly'*, N.Y. Times (Mar. 1, 2023), https://www.nytimes.com/2023/05/22/nyregion/menopause-women-work.html [https://perma.cc/8WMY-N2UV]. Other news sources have also featured stories about menstruation and menopause. *See, e.g.*, Rachelle Bergstein, *Perimenopausal Women are 'Enraged'—and No Longer Keeping Quiet*, Wash. Post (Nov. 12, 2024), https://www.washingtonpost.com/style/of-interest/2024/11/12/perimenopause-moment [https://perma.cc/9BE9-2SUS].

[2] *See, e.g.*, Rebecca Mead, *Menopause Is Having a Moment*, New Yorker (Mar. 3, 2025), https://www.newyorker.com/magazine/2025/03/10/menopause-is-having-a-moment [https://perma.cc/A4Z6-7BDT]; Michelle Travis, *What Employers Should Know About Menopause Discrimination*, Forbes (May 21, 2024), https://www.forbes.com/sites/michelletravis/2024/05/21/what-employers-should-know-about-menopause-discrimination/ [https://perma.cc/W6RP-3WV3]; Hannah Chubb, *Why We Need to Talk About Perimenopause*, Harpers Bazaar (Nov. 20, 2023), https://www.harpersbazaar.in/beauty/story/we-need-to-talk-about-perimenopause-713898-2023-11-20 [https://perma.cc/7N9Z-ULSZ]; Christine Yu, *Silencing Period Talk Hurts Athletes*, Time (May 16, 2023), https://time.com/6279881/periods-sports-gender-bias/ [https://perma.cc/CJD8-6TZK]; MeiMei Fox, 6 *Ways Businesses Can and Should Commit to Menstrual Equity Now*, Forbes (Mar. 25, 2023), https://www.forbes.com/sites/meimeifox/2023/03/25/6-ways-businesses-can-and-should-commit-to-menstrual-equity-now/?sh=772d53a02051 [https://perma.cc/6GTL-NKLC].

[3] *See, e.g.*, Jen Gunter, Blood: The Science, Medicine, and Mythology of Menstruation (2024); Leah Hazard, Womb: The Inside Story of Where We All Began (2023); Jen Gunter, The Menopause Manifesto: Own Your Health with Facts and Feminism (2021).

[4] *See, e.g.*, Me Period (Black Women's Health Imperative 2024) (featuring the personal experiences of menstruators, particularly menstruators of color); The M Factor: Shredding the Silence on Menopause (PBS 2024) (exploring lived experiences with menopause); Are You There God, It's Me Margaret (Lionsgate 2023); Periodical (MSNBC Films 2023) (spotlighting experiences with menstruation).

[5] *See, e.g.*, *Period Stigma in Film & TV* Diva Int'l Inc., (Aug. 17, 2023), https://shop-diva.com/blogs/the-conscious-cycle/period-stigma-in-film-tv [https://perma.cc/9PPL-F2S4] (describing a scene in *Last of Us* that portrays a teenager receiving a menstrual cup in an apocalyptic future, showing that even in a fight for survival, menstruators still menstruate).

[6] Joshua Cohen, *Menopausal Drug Veozah Features Prominently Among Super Bowl Ads*, Forbes (Feb. 12, 2024), https://www.forbes.com/sites/joshuacohen/2024/02/12/menopausal-drug-veozah-features-prominently-among-superbowl-ads/?sh=3b00d80124ca [https://perma.cc/G9RE-3R8F].

[7] *See, e.g.*, *Don't Miss These Brilliant Services in the Paris 2024 Olympic Village*, Olympics (June 20, 2024), https://olympics.com/athlete365/articles/details/don-t-miss-these-brilliant-services-in-the-paris-2024-olympic-village [https://perma.cc/856P-CFT6] (touting that the Olympic Village offered complimentary "period protection products"); FP Explainers, *Mirabai Chanu Says She Lost Olympic Medal Due to Periods. Here's How Athletes Manage Menstruation*, FirstPost (Aug. 9, 2024), https://www.firstpost.com/explainers/mirabai-chanu-paris-olympic-medal-periods-how-athletes-manage-menstruation-13802890.html [https://perma.cc/TAL5-UKE8]; Katie Camero, *What It's Like Doing Olympic Gymnastics During Your Period*, Self (Aug. 1, 2024), https://www.self.com/story/olympics-womens-gymnastics-periods [https://perma.cc/9TZV-65K7].

[8] *See, e.g.*, Oprah Winfrey, *Menopause Curriculum*, Oprah Daily, https://www.oprahdaily.com/menopause-class/ [https://perma.cc/GJ9W-UDR2].

[9] *See* Jenny Bailly, *Gabrielle Union Opens Up About Hair Loss and Hot Flashes*, Allure (Nov. 13, 2023), https://www.allure.com/story/gabrielle-union-menopause-interview [https://perma.cc/E3RL-AHCP].

Katy Perry,[10] Halle Berry,[11] and Drew Barrymore,[12] are talking about their lived experiences as menstruators.[13]

A burgeoning menstrual equity movement has highlighted long-standing injustices related to menstruation; policymakers and business leaders are taking note. Roughly half of American states have passed laws, often with bipartisan support, abolishing the "tampon tax," an unfair tax premised on the idea that menstrual products are "luxury items" rather than essential medical supplies.[14] Former President Joe Biden and First Lady Dr. Jill Biden launched a major government funding initiative on women's health, which specifically highlighted the need for more study of perimenopause and menopause.[15]

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[10] MTV, *Katy Perry Accepts the Video Vanguard Award | 2024 VMAs*, YouTube, at 0:05–0:09 (Sept. 11, 2024), https://www.youtube.com/watch?v=3XXAMJ_0htg [https://perma.cc/DK8C-UDBZ] (accepting the 2024 Video Vanguard Award, Perry started by sharing, "Thank you. I did that all on my first day of my period too. Can you believe it?").

[11] Mariam Khan & Katie Kindelan, *Halle Berry Shouts 'I'm in Menopause' on Capitol Hill as She Fights for Funding to Improve Women's Care*, ABC News (May 2, 2024), https://abcnews.go.com/GMA/Wellness/halle-berry-shouts-im-menopause-capitol-hill-fights/story?id=109881356 [https://perma.cc/WV8R-CZ6G].

[12] *See* Vanessa Etienne, *Drew Barrymore Has First Hot Flash—with Jennifer Aniston by Her Side: 'So Glad This Is Documented',* People (Mar. 28, 2023), https://people.com/health/drew-barrymore-has-first-hot-flash-with-jennifer-aniston-menopause/ [https://perma.cc/RDV3-FLHC]; *see also, e.g.*, Sam Manzella & Maggie Ryan, *20 Celebrities Who Have Gotten Real About Going Through Perimenopause & Menopause*, SheKnows (May 2, 2024), https://www.sheknows.com/health-and-wellness/slideshow/2658982/celebrities-going-through-menopause-perimenopause/16/ [https://perma.cc/CM99-777X].

[13] We use the term menstruator to include people who have experienced the menstrual cycle. This includes people who are menstruating, whose menstruation is paused, and who are in perimenopause or menopause. Most frequently, menstruators are cisgender women and girls, but they also may be transgender boys, transgender men, and persons who are genderqueer, nonbinary, or intersex.

PWFA's language is gender neutral, and it provides support for any person with a relevant health condition. That said, since the vast majority of persons who have a menstrual cycle are cisgender women, failure to accommodate menstruating workers implicates women's equality more generally. We primarily use the term menstruator, which is a purposefully gender-inclusive term. As context dictates, we also sometimes refer to women who menstruate or use female pronouns. *See* Irin Carmon, *You Can Still Say 'Woman' But You Shouldn't Stop There*, N.Y. Mag. (Oct. 28, 2021), https://nymag.com/intelligencer/2021/10/abortion-law-trans-inclusive-advocacy.html [https://perma.cc/TA2C-N9UV] (exploring the significance of language choices in this context).

[14] *Tampon Tax*, All. for Period Supplies, https://allianceforperiodsupplies.org/tampon-tax/ [https://perma.cc/9EY6-9RN4] (stating that 20 states continue to impose sales tax on menstrual products as of May 14, 2024, and mapping the movement's timeline); *see, e.g.*, Eder Campuzano, *Minnesota Legislature Passes Sweeping Education Bill: 6 Ways It Will Impact State's Schools*, Minn. Star Trib. (May 17, 2023), https://www.startribune.com/minnesota-legislature-passes-sweeping-education-bill-read-act-free-school-meals-funding-boost/600275618 [https://perma.cc/UPF2-W7BQ]; William Melhado, *Texas Gov. Greg Abbott Joins Other Key Republicans in Supporting Repealing the "Tampon Tax"*, Tex. Trib. (Aug. 19, 2022), https://www.texastribune.org/2022/08/18/glenn-hegar-joan-huffman-tampon-tax/ [https://perma.cc/E6GD-SYAG].

[15] *See Launch of White House Initiative on Women's Health Research*, The White House (Nov. 17, 2023), https://www.whitehouse.gov/gpc/briefing-room/2023/11/17/launch-of-white-house-initiative-on-womens-health-research/ [https://perma.cc/6Q3Y-CBT8]; *Memorandum on the White House Initiative on Women's Health Research,* The White House (Nov. 13, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/11/13/

During his first administration, President Donald Trump signed the CARES Act, which permits menstrual products to be purchased with pre-tax dollars via Flexible Spending Accounts, and the First Step Act, which, as part of a larger package of criminal justice reforms, improved access to menstrual products in carceral facilities.[16] State bar associations are revising policies related to the bar exam to account for menstruation.[17] And Fortune 500 companies like Bank of America have invested in research about menstruation and menopause in the workplace and how to reduce the stigma associated with these basic processes.[18]

The heightened attention to menstruation and menopause and their effects on the workplace comes at an opportune time. A major new civil rights law, the landmark Pregnant Workers Fairness Act (PWFA) became effective in June 2023,[19] and regulations to implement the law took effect in June 2024.[20] PWFA was the product of more than a decade of advocacy at both the federal and state levels.[21] Prior to PWFA, workers could sometimes receive help for needs related to the female reproductive system under sex discrimination or disability laws, but many such claims fell between the cracks.[22] Collectively,

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memorandum-on-the-white-house-initiative-on-womens-health-research/ [https://perma.cc/T7MN-JAGG].

[16] *See* Pub. L. No. 116–136 § 3702(c), 134 Stat. 281, 416 (2020); 18 U.S.C. § 4042 note (citing Pub. L. No. 115–391, title VI, § 611, 132 Stat. 5194, 5247 (2018)); *see also* Fed. Bureau of Prisons, U.S. Dep't of Just., 003-2018, Operations Memorandum (2018); Fed. Bureau of Prisons, U.S. Dep't of Just., 001-2017, Provision of Feminine Hygiene Products (2017).

[17] *See, e.g.*, Cara Bayles, *Bar-Takers See Accommodation Gap for Periods, Lactation*, Law360 (Feb. 26, 2024), https://www.law360.com/pulse/articles/1805939/bar-takers-see-accommodation-gap-for-periods-lactation [https://perma.cc/SWK7-J6Z6].

[18] *See, e.g.*, Bank of America, Breaking Through the Stigma: Menopause in the Workplace 2 (2024); *see also* Karen Feldscher, *Apple Women's Health Study Advances Understanding of Menstrual Cycles and Health*, Harv. T.H. Chan Sch. of Pub. Health (Feb. 1, 2023), https://www.hsph.harvard.edu/news/features/apple-womens-health-study-advances-understanding-of-menstrual-cycles-and-health/ [https://perma.cc/PD6T-ETDP] (describing Apple's research on the COVID-19 pandemic's effects on menstruation); Travis, *supra* note 2; Fox, *supra* note 2.

[19] Consol. Appropriations Act, 2023, Act of Dec. 29, 2022, Pub. L. No. 117-328, div. II, §§ 101–109, 136 Stat. 4459, 6084–90 (2022) (Pregnant Workers Fairness Act); *see id.* at § 109 (specifying effective date of 180 days after enactment).

[20] *Implementation of the Pregnant Workers Fairness Act*, 89 Fed. Reg. 29096–220 (Apr. 19, 2024) (codified at 29 C.F.R. Part 1636); *see id.* at 29096 (specifying effective date of June 18, 2024).

[21] One of us has discussed this history extensively in other work. *See* Deborah A. Widiss, *The Federal Pregnant Workers Fairness Act: Statutory Requirements, Regulations, and Need (Especially in Post-*Dobbs *America)*, 27 Emp. Rights & Emp. Pol'y J. 85, 88–95 (2024) [hereinafter *Federal PWFA*] (discussing need for and advocacy that led to passing the federal PWFA); Deborah A. Widiss, *Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America*, 22 Nev. L.J. 1131 (2022) [hereinafter *PWFAs in Red and Blue America*] (discussing campaigns to pass state PWFAs).

[22] *See, e.g.*, Widiss, *PWFAs in Red and Blue America*, *supra* note 21, at 1136–43 (discussing cases seeking protections for pregnancy-related needs under sex discrimination or disability laws).

these failures served as a significant barrier to ensuring workplace equality, one that PWFA is intended to address.[23]

This Article is the first detailed exploration of how PWFA can—and should—be interpreted to address the needs of menstruators. It also discusses how PWFA's requirements fit together with more general prohibitions on discrimination on the basis of sex and with workplace health laws to provide important legal support for menstruators.[24] The heart of PWFA is a requirement that employers provide "reasonable accommodations" for limitations related to "pregnancy, childbirth, or related medical conditions."[25] Menstruation is a necessary precondition for pregnancy, menstrual disorders are a common cause of infertility, birth control often impacts menstruation, pregnancy after forty may be mistaken for menopause, and the ultimate cessation of menstruation marks the end of the possibility of pregnancy.[26]

Given the close connection between the menstrual cycle and pregnancy, it is not surprising that the federal Equal Employment Opportunity Commission's (EEOC) regulations for PWFA recognize that menstruation can be within the ambit of the statute.[27] This regulatory reference is nevertheless notable: it is the *first* federal regulation that explicitly requires accommodation for some

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[23] *See, e.g.*, H.R. Rep. No. 117-27, at 11 (2021) ("No worker should have to choose between their health, the health of their pregnancy, and the ability to earn a living.").

[24] This Article draws on a Comment submitted by the authors in response to the EEOC's proposed regulations for PWFA. *See* Marcy L. Karin & Deborah A. Widiss, Comment in Response to EEOC-2023-0004 (Proposing Regulations to Implement the Pregnant Workers Fairness Act) (Oct. 10, 2023), https://bit.ly/PWFA-Menstruation-LawProfComment [https://perma.cc/W6RZ-S6QK] [hereinafter Karin & Widiss, Comment]. The Article also builds on recent work exploring law's role in addressing the effects of menstruation in the workplace and menstruation and the law more generally. *See, e.g.*, Bridget J. Crawford & Emily Gold Waldman, Menstruation Matters: Challenging the Law's Silence on Periods (2022); Deborah A. Widiss, *Time Off Work for Menstruation: A Good Idea?*, 98 N.Y.U. L. Rev. Online 170 (2023); Sydney Colussi, Elizabeth Hill, & Marian Baird, *Engendering the Right to Work in International Law: Recognising Menstruation and Menopause in Paid Work*, 5 Oxford Hum. Rts. Hub J. 1 (2023); Marcy L. Karin, *Addressing Periods at Work*, 16 Harv. L. & Pol'y Rev. 449 (2022) [hereinafter *Addressing Periods*]; Bridget J. Crawford, Emily Gold Waldman, & Naomi R. Cahn, *Working Through Menopause*, 99 Wash. U. L. Rev. 1531 (2022); Emily Gold Waldman, Naomi R. Cahn, & Bridget J. Crawford, *Contextualizing Menopause in the Law*, 45 Harv. J.L. & Gender 1 (2022); Marcy L. Karin, Margaret E. Johnson, & Elizabeth B. Cooper, *Menstrual Dignity and the Bar Exam*, 55 U.C. Davis L. Rev. 1 (2021); Prianka Nair, *Menstruation: An Ableist Narrative*, 41 Colum. J. Gender & L. 180 (2021); Inga Winkler, *Menstruation and Human Rights: Can We Move Beyond Instrumentalization, Tokenism, and Reductionism*?, 41 Colum. J. Gender & L. 244 (2021); Margaret E. Johnson, *Menstrual Justice*, 53 U.C. Davis L. Rev. 1 (2019). For other analysis of PWFA, *see, e.g.*, Widiss, *Federal PWFA*, *supra* note 21; William R. Corbett, *Reasonably Accommodating Employment Discrimination Law*, 128 Pa. St. L. Rev. 535 (2024); Madeleine Gyory, *The Reasonable Pregnant Worker*, 113 Calif. L. Rev. (forthcoming 2025) (on file with authors); Note, *Finally Protected: Analyzing the Potential of the Pregnant Workers Fairness Act*, 137 Harv. L. Rev. 662 (2023).

[25] 42 U.S.C. § 2000gg-1(1).

[26] *See infra* Part I.

[27] Menstruation is explicitly mentioned in the text of the regulations under the definition of "[p]regnancy, childbirth, or related medical conditions." 29 C.F.R. § 1636.3(b). As discussed *infra* Part II, the EEOC's recognition that menstruation—including perimenopause and menopause—may fall within the statutory language is firmly grounded in prior

menstruation-related needs at work.[28] The preamble to the regulations also notes that failure to accommodate menstruation may violate the more general prohibition on discrimination on the basis of sex in Title VII of the Civil Rights Act of 1964 (Title VII).[29] Revised regulations and guidance governing nondiscrimination in education and harassment in the workplace, which were also released in the spring of 2024, likewise confirm that discrimination related to menstruation may be a form of sex-based discrimination.[30] And a recent issue brief from the Women's Bureau of the federal Department of Labor (DOL) discusses a range of workplace supports menstruators may need and explains how both discrimination laws and more general labor laws may apply.[31]

This Article proceeds as follows, making several contributions. The Article first lays the groundwork for the discussion of PWFA and the other new administrative guidance by explaining the science of menstruation, the connection between menstruation and pregnancy, and the relationship between work and menstruation.[32] Part I also discusses the range of appropriate workplace modifications for menstruation and menopause.[33] Of course, many menstruators are able to handle menstruation-related needs—such as taking bathroom breaks, leaving work briefly to buy menstrual products if a period arrives unexpectedly, or choosing to work from home if they are experiencing particularly painful cramps—without asking permission from a supervisor, let alone conceiving of such actions as "accommodations." But other workers are subject to strict rules that preclude such flexibility.[34]

Part II explains how courts and the EEOC have previously handled menstruation-related claims under Title VII, as amended by the Pregnancy Discrimination Act (PDA). The relevant language in PWFA—"pregnancy,

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case law interpreting the analogous language in Title VII, as well as the plain meaning of the statutory language.

[28] *See* ABA Section of Civil Rights and Social Justice, *Chair Chat with Marcy L. Karin on Menstruation, Menopause and the Law*, YOUTUBE (May 23, 2024), 20:20–22:44, https://www.youtube.com/watch?v=T1ERNDRx0ps [https://perma.cc/S4JB-VKBG] (observing that "menstruation was included for the first time in [the PWFA] regulations …").

[29] *Implementation of the Pregnant Workers Fairness Act*, 89 Fed. Reg. 29096, 29101 n.40 (Apr. 19, 2024).

[30] *See* U.S. EQUAL OPPORTUNITY COMM'N, NO. 915.064, ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE § III(B)(3)(a) (2024); *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474 (Apr. 29, 2024) (codified at 34 C.F.R. pt. 106); *see also infra* text accompanying note 228 (discussing potential impact of President Trump's Executive Order 14,168 regarding gender ideology).

[31] *See generally* ELEANOR DELAMATER & MATHILDE ROUX, WOMEN'S BUREAU, U.S. DEP'T OF LAB., LET'S TALK ABOUT IT: MENSTRUATION AND MENOPAUSE AT WORK (2024) for discussion of workplace menstruation.

[32] *See infra* Part I.A.

[33] *See infra* Part I.B.

[34] *Cf.* Widiss, *Federal PWFA*, *supra* note 21, at 88–90 (discussing research showing that prior to PWFA, requests by pregnant workers for basic accommodations such as access to the restroom were routinely denied).

childbirth, or related medical conditions"—was borrowed from the PDA.[35] This case law supports the EEOC's recognition that menstruation can be a "related medical condition" to pregnancy, and also that denying support for menstruators can implicate sex discrimination protections generally.[36] The facts giving rise to these cases also highlight that menstruating workers are routinely denied basic accommodations and that they are often subjected to harassment and discrimination.

Part III explains PWFA and its application to menstruation. This includes a brief overview of the new law, followed by a detailed discussion of the references to menstruation in the PWFA regulations.[37] Part III also reviews other administrative guidance issued during the Biden Administration that likewise addresses how non-discrimination provisions and workplace standards may apply to menstruation-related needs.[38] These regulatory developments are important advances, but they fall short of comprehensive support for menstruators.

Part IV explores a range of options that could help ensure menstruators receive appropriate support from their employers to address menstruation and the transition to menopause with dignity. Part IV offers suggestions for employers on how to implement PWFA to cover menstruation-related needs without spurring discrimination or harassment. This Part also explains how PWFA works in tandem with more general workplace laws that address employee health needs. Finally, it calls for new legislation and other public policy to achieve menstrual justice—the basic principle that menstruators should enjoy full and equal participation in the workplace.[39] A brief conclusion follows.

I. Menstruation, Perimenopause, and Menopause in the Workplace

The menstrual cycle is central to the human reproductive system, and roughly half the workforce menstruates for much of their working life.[40] Yet, menstruation, perimenopause, and menopause are stigmatized and are seldom discussed publicly.[41] In most states, there also is no requirement that schools

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[35] *Compare* 42 U.S.C. § 2000gg-1(1) (Pregnant Workers Fairness Act)*, with* 42 U.S.C. § 2000e(k) (language added to Title VII by the Pregnancy Discrimination Act).

[36] *See infra* Part II.

[37] *See infra* Part III.A–B.

[38] *See infra* Part III.C.

[39] *See infra* Part IV; Johnson, *Menstrual Justice*, *supra* note 24, at 1–2 (defining menstrual injustice as the oppression of women, girls, and other individuals who menstruate); Margaret E. Johnson, *Asking the Menstruation Question to Achieve Menstrual Justice,* 41 Colum. J. Gender & L. 158, 159 (2021) ("The goal of menstrual justice is to identify, reduce, and remedy harm resulting from structural oppression of menstruators.").

[40] *News Release: Bureau of Labor Statistics*, U.S. Dep't of Lab. (Jan. 28, 2025), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/7FRN-89GX] (reporting there were roughly 69.5 million women and roughly 75 million men in the workforce in 2023).

[41] *See* Ingrid Johnston-Robledo & Joan C. Chrisler, *The Menstrual Mark: Menstruation As Social Stigma*, *in* The Palgrave Handbook of Critical Menstruation Studies

provide education on these subjects.[42] Accordingly, this section provides basic background on the menstrual cycle and its connection to pregnancy. This information may be helpful even to menstruators; there is significant variety among individuals as to how they experience menstruation and menopause.[43] This Part also discusses a range of accommodations that menstruators may need to thrive at work.

A. The Menstrual Cycle and Related Conditions

The menstrual cycle is a process driven by hormones regularly released from the ovaries.[44] These hormones cause blood-rich tissues to gradually build up in the lining of the uterus[45]; at about the midpoint of a menstrual cycle, hormones prompt an egg to be released from an ovary, a process called ovulation.[46] Pregnancy and menstruation represent the two possible outcomes of this ovulation.[47] Pregnancy occurs when an ovulated egg is fertilized and successfully implanted in the uterus[48]; menstruation happens when the uterus sheds

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181, 184–87 (2020); *see generally* Jennifer Weiss-Wolf, Periods Gone Public: Taking a Stand for Menstrual Equity (2017).

[42] *See* Margaret Johnson & Marcy L. Karin, *Now More Than Ever, It's Time for Universal Menstrual Education for Gender Equality*, Ms. Mag. (June 10, 2022), https://msmagazine.com/2022/06/10/universal-menstrual-education-period-products-information/ [https://perma.cc/GTU5-9B7V]; Karin, *Addressing Periods*, *supra* note 24, at 459–60.

[43] *See Menstrual Cycles Today: How Menstrual Cycles Vary by Age, Weight, Race, and Ethnicity*, Harv. T.H. Chan Sch. of Pub. Health (Nov. 2022), https://hsph.harvard.edu/research/apple-womens-health-study/study-updates/menstrual-cycles-today-how-menstrual-cycles-vary-by-age-weight-race-and-ethnicity/ [https://perma.cc/R8WU-4ERJ]; *see also* Jyothsna Latha Belliappa, *Menstrual Leave Debate: Opportunity to Address Inclusivity in Indian Organizations*, 53 Indian J. Indus. Rels. 604, 607 (2018); *What Is Menopause?*, Nat'l Inst. on Aging (Oct. 16, 2024), https://www.nia.nih.gov/health/what-menopause [https://perma.cc/LM8L-4S2U].

[44] The government shares helpful information about the menstrual cycle via the Office on Women's Health of the Department of Health and Human Services (DHHS), the Centers for Disease Control and Prevention (CDC), the National Institutes of Health (NIH), and other agency websites. *See, e.g.*, *Menstrual Cycle,* Off. on Women's Health (Feb. 22, 2021), https://womenshealth.gov/menstrual-cycle [https://perma.cc/T3H4-T4CA]; *Healthy Habits: Menstrual Hygiene*, Ctrs. for Disease Control & Prevention (May 7, 2024), https://www.cdc.gov/hygiene/about/menstrual-hygiene.html [https://perma.cc/VV3Q-F9WT]; *Menses,* Nat'l Cancer Inst. at the Nat'l Inst. of Health, https://www.cancer.gov/publications/dictionaries/cancer-terms/def/menses [https://perma.cc/2DCP-HG6G].

The menstrual cycle is also called menses. *See id*. Menarche is the medical term for a person's first menstrual period, which generally occurs between the ages of eight to fifteen. Gladys M. Martinez, Nat'l Health Stats., Trends and Patterns in Menarche in the United States: 1995 through 2013–2017, at 3 (2020).

[45] *Menstruation and Menstrual Problems*, Nat'l Inst. of Health, https://www.nichd.nih.gov/health/topics/factsheets/menstruation [https://perma.cc/U9DF-UZ9X].

[46] *Id.*

[47] *Id.* A third option exists: ectopic pregnancies. An ectopic pregnancy occurs when a fertilized egg implants in the fallopian tube or other place outside of the uterus, likely resulting in a miscarriage. *Ectopic Pregnancy*, MedlinePlus (Aug. 14, 2024), https://medlineplus.gov/ectopicpregnancy.html [https://perma.cc/8WSS-EZ2V].

[48] *Menstruation and Menstrual Problems,* Nat'l Inst. of Health, *supra* note 45.

its lining because the egg was not implanted.[49] This is why people commonly use the "last menstrual period" (LMP) as the starting point for calculating pregnancy duration.[50] Some people trying to conceive track their menstrual cycles to know optimal times for fertilization or to determine if they might be pregnant.[51] For people not trying to conceive, tracking may help uncover menstrual irregularities.[52] Additionally, a missed period may be the first sign that a person is pregnant (even if she was not purposefully trying to conceive).

Periods, the colloquial term for the shedding of the uterine lining, last on average four to seven days per cycle, and cycles average from 21 to 38 days.[53] On average, two to three tablespoons of blood and tissue are discharged each cycle.[54] Menstruators usually use products such as tampons, pads, cups, or reusable period underwear to absorb or capture this discharge as it is released from the body. Depending on the product used, and the heaviness of the person's discharge, these products may need to be changed as frequently as once an hour, although more typically they need to be changed every two to six hours.[55] The used product needs to be promptly disposed of or cleaned.[56] The duration of a period, the length of the overall cycle, and the heaviness of the flow may vary from month to month and often change with age.[57]

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[49] *Id.*

[50] Kenia I. Edwards & Petr Itzhak, *Estimated Date of Delivery*, StatPearls, Nat'l Inst. of Health (Sept. 10, 2024), https://www.ncbi.nlm.nih.gov/books/NBK536986/ [https://perma.cc/FF3N-VCY8]; *How Your Fetus Grows During Pregnancy*, Am. Coll. of Obstetricians & Gynecologists (Jan. 2024), https://www.acog.org/womens-health/faqs/how-your-fetus-grows-during-pregnancy [https://perma.cc/R6F6-8987].

[51] HHS provides an online calendar to the public to help menstruators track the days for which they might be fertile. *See Ovulation Calculator*, Off. on Women's Health (Feb. 15, 2021), https://www.womenshealth.gov/ovulation-calculator [https://perma.cc/BE25-PKWU].

[52] *What Are Menstrual Irregularities?*, Nat'l Inst. of Child Health & Hum. Dev. (Jan. 31, 2017), https://www.nichd.nih.gov/health/topics/menstruation/conditioninfo/irregularities [https://perma.cc/R5AP-LHYC]; *see also What Causes Menstrual Irregularities*?, Nat'l Inst. of Child Health & Hum. Dev. (Jan. 31, 2017), https://www.nichd.nih.gov/health/topics/menstruation/conditioninfo/causes [https://perma.cc/PY7Q-TR5L] (menstrual irregularities commonly include experiencing irregular or light periods, heavy or prolonged menstrual bleeding, and dysmenorrhea (menstrual pain)).

[53] *See, e.g.*, *Menstrual Cycle: What's Normal, What's Not*, Mayo Clinic (Apr. 22, 2023), https://www.mayoclinic.org/healthy-lifestyle/womens-health/in-depth/menstrual-cycle/art-20047186 [https://perma.cc/MXQ4-PWUS]; *Your Menstrual Cycle*, Off. on Women's Health (Jan. 13, 2025), https://womenshealth.gov/menstrual-cycle/your-menstrual-cycle [https://perma.cc/L7VG-XGUJ].

[54] *Your Menstrual Cycle*, *supra* note 53.

[55] *See* Karin, *Addressing Periods*, *supra* note 24, at 457–58; *cf.* Anna Maria van Eijk, Garazi Zulaika, Madeline Lenchner, Linda Mason, Muthusamy Sivakami, Elizabeth Nyothach, Holger Unger, Kayla Laserson, & Penelope A. Phillips-Howard, *Menstrual Cup Use, Leakage, Acceptability, Safety, and Availability: A Systematic Review and Meta-Analysis,* 4 Lancet Pub. Health e376, e376–77 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6669309/ [https://perma.cc/XS64-75B8] (stating that menstrual cups should be changed every four to twelve hours).

[56] *Healthy Habits: Menstrual Hygiene*, *supra* note 44.

[57] *See Menstrual Cycles Today*, *supra* note 43; *see also What Is Menopause?*, *supra* note 43 (discussing changes to period length and heaviness of flow during menopausal transition).

Periods are not disabilities. However, even "normal" menstruation can cause dysmenorrhea, a condition characterized by painful menstrual cramps.[58] Cramps are caused by uterine contractions, which occur to help shed and expel the blood-rich tissues that accumulate in the uterine lining.[59] Roughly half of menstruators experience pain from cramps.[60] Medical recommendations to address this pain include taking nonsteroidal anti-inflammatory drugs (e.g., ibuprofen), using a heating pad, stretching, exercising, or sleeping.[61] Doctors also regularly prescribe hormonal birth control to alleviate menstrual cramps and to address other period irregularities.[62] Dehydration can increase bloating and menstrual cramps; drinking water helps reduce this pain by replenishing the water in the menstruator's circulating blood.[63] For many menstruators, this pain is manageable. For others, menstrual pain can interfere with normal activities for one or more days per cycle.

In addition to the discomfort or pain that is associated with "normal" menstruation, there are a number of menstrual disorders or conditions that may cause more severe pain or health risks.[64] Common menstruation-related conditions include endometriosis,[65] polycystic ovary syndrome (PCOS),[66]

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[58] *Dysmenorrhea: Painful Periods*, Am. Coll. of obstetricians & Gynecologists (Dec. 2020), https://www.acog.org/womens-health/faqs/dysmenorrhea-painful-periods [https://perma.cc/V2RQ-3D29].

[59] *Id.*; *Period Pain*, MedlinePlus (Aug. 12, 2024), https://medlineplus.gov/periodpain.html [https://perma.cc/29NY-ZFXY]. Cramps also may be a sign of endometriosis, uterine fibroids, or other conditions. *Endometriosis*, Off. on Women's Health (Feb. 22, 2021), https://www.womenshealth.gov/a-z-topics/endometriosis [https://perma.cc/UP3X-F8S5]; *Uterine Fibroids*, Off. on Women's Health (Feb. 19, 2021), https://www.womenshealth.gov/a-z-topics/uterine-fibroids [https://perma.cc/9JLP-AN86].

[60] *Dysmenorrhea: Painful Periods*, *supra* note 58.

[61] *Id.*; *see also, e.g.*, *Physical Activity and Your Menstrual Cycle*, Off. on Women's Health (Feb. 16, 2021), https://www.womenshealth.gov/getting-active/physical-activity-menstrual-cycle [https://perma.cc/P7CT-P4P7]; Mike Armour, Caroline A. Smith, Kylie A. Steel, & Freya Macmillan, *The Effectiveness of Self-Care and Lifestyle Interventions in Primary Dysmenorrhea: A Systematic Review and Meta-Analysis*, BMC Complement Alt. Med. (2019), https://pmc.ncbi.nlm.nih.gov/articles/PMC6337810/ [https://perma.cc/WKG3-XY9K].

[62] *See Delaying Your Period With Hormonal Birth Control*, Mayo Clinic (Jan. 29, 2025), https://www.mayoclinic.org/healthy-lifestyle/birth-control/in-depth/womens-health/art-20044044 [https://perma.cc/FEA7-QBPJ].

[63] Behnaz Torkan, Mahsasadat Mousavi, Samira Dehghani, Leila Hajipour, Narges Sadeghi, Marzieh Ziaei Rad, & Ali Montazeri, *The Role of Water Intake in the Severity of Pain and Menstrual Distress Among Females Suffering From Primary Dysmenorrhea: A Semi-Experimental Study*, BMC Women's Health, Jan. 28, 2021, at 1, 8 https://bmcwomenshealth.biomedcentral.com/articles/10.1186/s12905-021-01184-w [https://perma.cc/6BSX-HYFJ]; Emilia Benton, *The 1 Surprising Reason You May Need to Drink More Water, According to a Doctor*, Popsugar (June 25, 2019), https://www.popsugar.com/fitness/should-i-drink-more-water-my-period-45995843 [https://perma.cc/9796-UHFT].

[64] Karin, *Addressing Periods*, *supra* note 24, at 456–58.

[65] *See, e.g.*, *Endometriosis*, Off. on Women's Health, *supra* note 59 (explaining that endometriosis occurs "when tissue similar to the lining of the uterus grows outside of [the] uterus" and further describing common symptoms such as chronic pain, bleeding and spotting between menstrual cycles, infertility, and digestive issues).

[66] *See About Polycystic Ovary Syndrome (PCOS)*, Nat'l Inst. Child Health & Hum. Dev. (Aug. 21, 2024), https://www.nichd.nih.gov/health/topics/pcos/conditioninfo [https://

premenstrual dysphoric disorder (PMDD),[67] and uterine fibroids.[68] While symptoms differ, among other things, these conditions may cause heavy bleeding, unpredictable periods, and severe pain.[69] Menstrual conditions also can lead to increased risk of infections to the reproductive system as a result of bacteria accumulating through endometrial adhesions and cysts.[70] These conditions are often misdiagnosed or undiagnosed and may remain untreated for extended periods.[71]

Menstrual conditions also interfere with a person's ability to become pregnant or to experience a safe birth. Endometriosis, which impacts 10–15% of fertile age women, is one of the most common causes of infertility.[72] PCOS, which impacts about 10% of fertile age women, is also a common cause of infertility.[73] PCOS during pregnancy is correlated with increased risks of preterm delivery, gestational diabetes, preeclampsia, macrosomia, miscarriage, and fetal death.[74] Uterine fibroids do not usually impact a person's ability to

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perma.cc/8VYV-DXHR] (explaining that "PCOS is a set of symptoms related to a hormonal imbalance," and that these symptoms may include absence of ovulation, high levels of androgens, and abnormal growths on one or both ovaries; these symptoms may result in irregular menstruation).

[67] PMDD is a response to hormonal differences after ovulation that may cause severe irritability, anxiety, panic attacks, fatigue, mood swings, digestive problems, cramps, bloating, and joint or muscle pain, among other things. *Premenstrual Dysphoric Disorder (PMDD)*, Off. on Women's Health (Feb. 22, 2021), https://www.womenshealth.gov/menstrual-cycle/premenstrual-syndrome/premenstrual-dysphoric-disorder-pmdd [https://perma.cc/DU8H-Q5YY].

[68] Fibroids are generally non-cancerous muscular tumors growing on the wall of the uterus. *See Uterine Fibroids*, *supra* note 59 (explaining that some common symptoms include heavy bleeding and painful periods, enlargement of the lower abdomen, frequent urination, and lower back pain).

[69] Marcy L. Karin, Naomi Cahn, Elizabeth B. Cooper, Bridget J. Crawford, & Margaret E. Johnson, *Title IX and 'Menstruation or Related Conditions'*, 30 Mich. J. Gender & L. 25, 31 (2022); *see also* Karin, *Addressing Periods*, *supra* note 24, at 456–60 (discussing menstrual symptoms and conditions and noting that some of these conditions such as fibroids are disproportionately diagnosed in Black menstruators).

[70] *See, e.g.*, PK Tan, *PCOS and Bacterial Infections: Is There a Link?, PK Women's Specialist Clinic* (Jan. 7, 2025), https://pkwomensclinic.com.sg/pcos-and-bacterial-infections-is-there-a-link/ [https://perma.cc/GYR2-LHXU]; Ayako Muraoka, Akira Yokoi, & Hiroaki Kajiyama, *Emerging Bacterial Factors for Understanding Pathogenesis of Endometriosis*, iScience, Jan. 19, 2023, at 1; Yuanyuan Gu, Guannan Zhou, Fangyue Zhou, Yao Li, Qiongwei Wu, Hongyu He, Yi Zhang, Chengbin Ma1, Jingxin Ding, & Keqin Hua, *Gut and Vaginal Microbiomes in PCOS: Implications for Women's Health*, Fronteirs Endocronology, Feb. 23. 2022, at 1.

[71] *See* Karin, Cahn, Cooper, Crawford, & Johnson, *Title IX and 'Menstruation or Related Conditions*,' *supra* note 69, at 31.

[72] Jaime Garcia-Fernandez & Juan A. García-Velasco, *Endometriosis and Reproduction: What We Have Learned*, 93 Yale J. Biol. Med. 571, 571 (2020); *see also* Dominique de Ziegler, Bruno Borghese, & Charles Chapron, *Endometriosis and Infertility: Pathophysiology and Management*, 376 The Lancet 730, 730 (2010) (exploring links between endometriosis and infertility).

[73] *Polycystic Ovary Syndrome*, Off. on Women's Health (Feb. 22, 2021), https://www.womenshealth.gov/a-z-topics/polycystic-ovary-syndrome [https://perma.cc/VPA3-X3VW].

[74] *Id.*; *cf. About Polycystic Ovary Syndrome (PCOS)*, *supra* note 66; Rachel Gurevich, *How to Get Pregnant with No Period or Irregular Periods*, Parents (July 9, 2024), https://www.verywellfamily.com/how-to-get-pregnant-with-irregular-periods-1959933 [https://

get pregnant, but they may impact pregnancy and childbirth.[75] For example, fibroids may prevent safe vaginal delivery, dramatically increasing the likelihood that a cesarean section will be required.[76] Uterine fibroids also may result in pregnancy loss, placental abruption, or restriction of fetal growth.[77] More generally, period irregularities may make conception more difficult. Accordingly, experts often recommend diagnosing and addressing problems related to the menstrual cycle before attempting to become pregnant.[78]

Eventually, people stop menstruating. For approximately two to eight years beforehand, often starting in the mid-forties, menstruators experience perimenopause.[79] During this time, the body produces fewer hormones, releases fewer eggs to be fertilized and implanted, and periods may be especially unpredictable in terms of length, flow, and discharge amounts.[80] A menstruator may go a few months without a period and then experience a period again.[81] The changing levels of hormones accompanying perimenopause and menopause may also cause a variety of other symptoms.[82] These include vasomotor symptoms, such as hot flashes and night sweats, that disrupt body temperature and are caused by changes in blood vessels.[83] Other menopause symptoms include insomnia, memory problems, depression, and urinary and bladder issues.[84] Drinking cold water, exercising, removing layers of clothing, using a fan, or other actions can mitigate the effects of some of these symptoms.[85] Twelve months after their last period (measured retrospectively), a person is

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perma.cc/KY74-HV23]; Donna Christiano, *Getting Pregnant with Irregular Periods: What to Expect*, Healthline (Sept. 18, 2018), https://www.healthline.com/health/pregnancy/irregular-periods-and-pregnancy [https://perma.cc/K3MG-LHBL].

[75] *Uterine Fibroids*, Off. on Women's Health, *supra* note 59 ("Women who have fibroids are more likely to have problems during pregnancy and delivery."); *Uterine Fibroids*, Mayo Clinic (Sept. 15, 2023), https://www.mayoclinic.org/diseases-conditions/uterine-fibroids/symptoms-causes/syc-20354288 [https://perma.cc/H52P-F2PQ] (noting that infertility from fibroids is possible).

[76] *See Uterine Fibroids*, Off. on Women's Health, *supra* note 59.

[77] *Id.*; Mayo Clinic, *supra* note 75.

[78] *See* Gurevich, *supra* note 74; *Trying to Conceive*, Off. on Women's Health (Feb. 22, 2021), https://www.womenshealth.gov/pregnancy/you-get-pregnant/trying-conceive#1 [https://perma.cc/433Y-V8TV]; Christiano, *supra* note 74.

[79] *See Perimenopause*, Johns Hopkins Med., https://www.hopkinsmedicine.org/health/conditions-and-diseases/perimenopause [https://perma.cc/ZMW6-ZZTB]; *Menopause Basics*, Off. on Women's Health (Jan. 10, 2025), https://www.womenshealth.gov/menopause/menopause-basics [https://perma.cc/N97Q-95JQ].

[80] *Perimenopause,* Johns Hopkins Med., *supra* note 79; Jessica Timmons, *Perimenopause and Discharge: What to Expect*, Healthline (Oct. 9, 2024), https://www.healthline.com/health/menopause/perimenopause-discharge [https://perma.cc/J4KN-L2RV].

[81] *Menopause Basics*, Off. on Women's Health, *supra* note 79.

[82] Rebecca C. Thurston & Hadine Joffe, *Vasomotor Symptoms and Menopause: Findings from the Study of Women's Health Across the Nation*, 38 Obstetrics & Gynecology Clinics N. Am. 489, 490 (2012).

[83] *Id*. at 491.

[84] *Menopause Symptoms and Relief*, Off. on Women's Health (Jan. 10, 2025), https://www.womenshealth.gov/menopause/menopause-symptoms-and-relief [https://perma.cc/47M9-SEEA].

[85] *Id.*

deemed to have entered menopause; in the United States, most people reach menopause in their early fifties.[86]

The chance of a viable pregnancy decreases during perimenopause, but conception remains possible until menopause.[87] The irregularity of cycles during perimenopause makes pregnancy less likely.[88] That said, older menstruators may not realize they are pregnant for several months, mistakenly believing that any skipped periods are due to perimenopause rather than pregnancy.[89]

Additionally, while menses stop during pregnancy, some pregnancy-related health problems may cause vaginal bleeding.[90] Such bleeding may look and feel like a period, and menstrual products may be used to absorb the blood and other material expelled from the vagina. When any bleeding occurs during a pregnancy—from spotting to heavy discharge—pregnant people are advised to notify their health care provider.[91] Some vaginal bleeding signals that the person needs to see a doctor or other health care provider immediately.

Various medical interventions, including chemotherapy, other cancer treatments, and oophorectomies (removal of one or both ovaries), can cause early menopause.[92] Pregnancy-related complications, and treatments for such complications, may also contribute to early menopause.[93] This includes certain

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[86] Mayo Clinic Staff, *Menopause*, Mayo Clinic (Aug. 7, 2024), https://www.mayoclinic.org/diseases-conditions/menopause/symptoms-causes/syc-20353397 [https://perma.cc/28AF-MK3R].

[87] M*enopause Basics*, Off. on Women's Health, *supra* note 79; Rachel Urrutia, *Can You Get Pregnant During Perimenopause?*, UNC Health Talk (June 9, 2022), https://healthtalk.unchealthcare.org/can-you-get-pregnant-during-perimenopause/ [https://perma.cc/P597-FGGS].

[88] Urrutia, *supra* note 87; *cf.* M*enopause Basics*, *supra* note 79.

[89] Many vasomotor symptoms affiliated with the transition to menopause are similar to pregnancy-related symptoms. *See* Annamarya Scaccia, *Are You Pregnant or Starting Menopause? Compare the Symptoms*, Healthline (May 3, 2017), https://www.healthline.com/health/menopause-or-pregnant#symptom-comparison [https://perma.cc/6KP5-WD55] (comparing common symptoms of perimenopause and pregnancy).

[90] For example, vaginal bleeding may occur because of implantation, placenta previa, placenta abruption, miscarriage, or ectopic pregnancy. *See Pregnancy Complications*, Off. on Women's Health (Dec. 5, 2024), https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications [https://perma.cc/YE39-H7GT] (further noting that "[s]potting early in pregnancy doesn't mean miscarriage is certain."); Dan Brennan, *How Can You Tell if You're Pregnant if You Have Irregular Periods?*, MedicineNet, https://www.medicinenet.com/how_to_know_youre_pregnant_with_irregular_periods/article.htm [https://perma.cc/A69M-GJG2]; *Bleeding During Pregnancy*, Am. Coll. of Obstetricians & Gynecologists (May 2021), https://www.acog.org/womens-health/faqs/bleeding-during-pregnancy [https://perma.cc/U34J-M36P].

[91] *Pregnancy Complications,* Off. on Women's Health, *supra* note 90.

[92] Valinda Riggins Nwadike, *Surgical Menopause*, Healthline (Oct. 28, 2024), https://www.healthline.com/health/surgical-menopause [https://perma.cc/5GH3-7YD7] (describing "surgical menopause" as occurring "after an oophorectomy, a surgery that removes the ovaries"); *Early or Premature Menopause*, Off. on Women's Health (Jan. 8, 2025), https://www.womenshealth.gov/menopause/early-or-premature-menopause [https://perma.cc/TE44-TT7X]. Periods also stop after a hysterectomy, the surgical removal of the uterus, but having a hysterectomy does not lead to menopause unless the ovaries are removed too. *Hysterectomy*, Off. on Women's Health (Dec. 29, 2022), https://www.womenshealth.gov/a-z-topics/hysterectomy [https://perma.cc/EQ24-E97Q].

[93] *See* Christine R. Langton, Brian W. Whitcomb, Alexandra C. Purdue-Smithe, Quaker E. Harmon, Susan E. Hankinson, JoAnn E. Manson, Bernard A. Rosner, & Elizabeth R.

autoimmune conditions triggered or exacerbated by pregnancy or childbirth that can impact ovarian function.[94] Similarly, severe uterine bleeding, placenta spectrum disorders, sepsis, or other complications during pregnancy, delivery, or shortly after childbirth may be treated by a hysterectomy.[95] A hysterectomy is a surgical procedure in which the patient's uterus is removed, precluding future menstruation and subsequent pregnancies; hysterectomies may trigger menopausal symptoms.[96] Often, patients may retain one or both ovaries after a hysterectomy; in this situation, the patient may experience more acute vasomotor symptoms than are typical with "natural" menopause.[97]

Finally, several pregnancy-related medications may impact one's menstrual cycle. Some forms of birth control largely stop periods;[98] others may cause prolonged or heavier menstrual flow.[99] Some people who take levonorgestrel

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Bertone-Johnson, *Association of Adverse Pregnancy Outcomes and Multiple Gestation with Natural Menopause: A Population-Based Cohort Study*, Maturitas, Jan. 2023, at 82, 82 (identifying that adverse pregnancy outcomes and early menopause are each associated with increased cardiovascular risk).

[94] *See* Natalie V. Scime, Sonia M. Grandi, Joel G. Ray, Cindy-Lee Dennis, Mary A. De Vera, Hailey R. Banack, Simone N. Vigod, Alexa Boblitz, & Hilary K. Brown, *Pregnancy Complications and New-Onset Maternal Autoimmune Disease,* Int'l J. Epidemiol., Oct. 2024, at 1, 2; *cf.* Anna Szeliga, Marzena Maciejewska-Jeske, Monika Grymowicz, Katarzyna Smolarczyk, Anna Kostrzak, Roman Smolarczyk, Ewa Rudnicka, & Blazej Meczekalski, *Autoimmune Diseases in Patients with Premature Ovarian Insufficiency—Our Current State of Knowledge*, Int'l J. Molecular Scis., Mar. 2021, at 1; Thaïs Aliabadi, *About Pregnancy and Autoimmune Disorders*, Thaïs Aliabadi (Jan. 24, 2024), https://www.draliabadi.com/obstetrics/high-risk-obstetrics/autoimmune-disorders [https://perma.cc/BU8J-CE3L].

[95] This sometimes-emergency procedure is also known as a peripartum or cesarean hysterectomy. *See generally* Lovina S.M. Machado, *Emergency Peripartum Hysterectomy: Incidence, Indications, Risk Factors and Outcome*, N. Am. J. Med. Sci. (Aug. 2011), at 358 (observing that up to 8.9 out of every 1000 deliveries ends with an emergency peripartum hysterectomy); Dimitrios Tsolakidis, Dimitrios Zouzoulas, & George Pados, *Pregnancy-Related Hysterectomy for Peripartum Hemorrhage: A Literature Narrative Review of the Diagnosis, Management, and Techniques*, BioMed Rsch. Int. (July 6. 2021), at 1 (discussing postpartum hysterectomies); Athanasios F. Kallianidis, Douwe Rijntjes, Carolien Brobbel, Olaf Dekkers, Kitty Bloemenkamp, & Thomas van den Akker, *Incidence, Indications, Risk Factors, and Outcomes of Emergency Peripartum Hysterectomy Worldwide: A Systematic Review and Meta-analysis*, 141 Obstetric Gynecology 35 (2023) (observing that women in lower-income settings have a higher risk of needing an emergency perinatal hysterectomy).

[96] *Hysterectomy,* Off. on Women's Health, *supra* note 92.

[97] *Id.*

[98] Suzy Davenport, *5 Types of Birth Control that Stop Periods,* Medical News Today (Feb. 13, 2023), https://www.medicalnewstoday.com/articles/birth-control [https://perma.cc/PD3V-9XU6].

[99] *Heavy Periods & Birth Control*, Univ. of Colo. OB-GYN, https://obgyn.coloradowomenshealth.com/health-info/birth-control/medical-conditions-birth-control/heavy-periods [https://perma.cc/TH5T-ERX5]; *Abnormal Vaginal Bleeding & Birth Control*, Univ. of Colo. OB-GYN, https://obgyn.coloradowomenshealth.com/health-info/birth-control/medical-conditions-birth-control/vaginal-bleeding [https://perma.cc/JK6G-DU2U]; *Your Menstrual Cycle and Your Health*, Off. on Women's Health, (Jan. 13, 2025), https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle-and-your-health [https://perma.cc/2SLD-SF54]; *About Heavy Menstrual Bleeding*, Ctrs. of Disease Control & Prevention (May 15, 2024), https://www.cdc.gov/ncbddd/blooddisorders/women/menorrhagia.html [https://perma.cc/HQ29-74SD].

(Plan B One Step) also experience heavier periods.[100] Hormone replacement therapy (HRT), which may be used to treat vasomotor symptoms, to decrease estrogen levels as part of gender-affirming care, or for other reasons, may stop periods or cause vaginal bleeding that is different from prior cycles.[101]

B. Workplace Modifications

Workplaces are often not designed to address the menstrual cycle, just as workplaces are often inhospitable to pregnancy, childbirth, and other related conditions. In the absence of workplace accommodations, menstruators may find their productivity at work compromised during their cycles, or they may feel compelled to stay home for some days of their cycles.[102] Workers who are not allowed to change menstrual products when necessary, or who are forced to use makeshift solutions to capture discharge such as toilet paper, tissues, or paper towels, risk medical complications such as irritation or infection; more rarely, prolonged or make-shift product use can cause toxic shock syndrome.[103] If workplaces do not adequately address menstruation, some people who menstruate or experience menopause forgo professional opportunities or may even leave the workforce entirely.[104]

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[100] *Highlights of Prescribing Information*, Food & Drug Admin. (July 2009), https://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf [https://perma.cc/DS2V-HPRA].

[101] *Menopause & Hormones Common Questions*, Food & Drug Admin. (2019), https://www.fda.gov/media/130242/ [https://perma.cc/NSC6-BGRP]; *Gender-Affirming Hormone Therapy (GAHT)*, Johns Hopkins Med., https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/gender-affirming-hormone-therapy-gaht [https://perma.cc/7KFY-FT2C]; Tatnai Burnett, *Menopause Hormone Therapy: Does it Cause Vaginal Bleeding?*, Mayo Clinic (Jan. 11, 2023), https://www.mayoclinic.org/diseases-conditions/menopause/expert-answers/hormone-replacement-therapy/faq-20058499 [https://perma.cc/9B58-Z9UW].

[102] *See* Karin, *Addressing Periods*, *supra* note 24, at 462–67 (collecting studies).

[103] Karin, Johnson & Cooper, *Menstrual Dignity and the Bar Exam*, *supra* note 24, at 43 (citations omitted); *see* Sara Berg, *Why Stigma Prevents Treating Menstrual Hygiene as Essential*, Am. Med. Ass'n (Dec. 16, 2020), https://www.ama-assn.org/delivering-care/population-care/why-stigma-prevents-treating-menstrual-hygiene-essential [https://perma.cc/452T-YMK2] (observing that using makeshift products "can lead to dangerous physical health impacts such as vaginal and urinary tract infections, severe reproductive health conditions and toxic shock syndrome").

[104] Chartered Inst. of Pers. & Dev., Menopause in the Workplace Employee Experiences in 2023 18 (2023), https://www.cipd.org/globalassets/media/knowledge/knowledge-hub/reports/2023-pdfs/2023-menopause-report-8456.pdf [https://perma.cc/7F8X-HJPT] (showing that menopause caused 1 in 6 employees surveyed in the United Kingdom to consider leaving and an additional 6% to have left work in response to employers not acknowledging or addressing menopause); Carrot Fertility, Menopause in the Workplace 7 (2023), https://content.get-carrot.com/rs/418-PQJ-171/images/Menopause%20in%20the%20workplace%20report%202023%20(3).pdf [https://perma.cc/2YYJ-SMVA] (reporting that almost a third of survey respondents felt "less ambitious," that women of color are "more likely to feel like menopause may damage career growth," and that 31% of respondents contemplated "retiring early, taking extended leave, or quitting"); Stephanie S. Faubion, Felicity Enders, Mary S. Hedges, Rajeev Chaudhry, Juliana M. Kling, Chrisandra L. Shufelt, Mariam Saadedine, Kristin Mara, Joan M. Griffin, & Ekta Kapoor, *Impact of Menopause*

To mitigate such risks and to serve menstruators more generally, workplaces should ensure that all workers have ready access to menstrual-friendly restrooms.[105] This means ensuring workers have access to adequate bathrooms in numbers and locations sufficient to minimize time away from workstations. Bathrooms should include private spaces to remove used products and replace them with new products, as well as to change clothing if a leak occurs. Bathrooms should also include a place to dispose of used products and a sink (or at least access to running water) where menstruators may wash their hands, reusable products, and bodies and clothes if discharge leaked onto them. Ideally, the bathroom should also provide an adequate supply of a variety of free menstrual products.

Workers may need access to drinking water on demand to address dehydration that can cause excessive menstrual pain, or to cool down during or after a hot flash. Menstruators experiencing hot flashes may also need access to fans, ventilation, or temperature control, as well as uniform modifications, such as the option to wear fewer layers or more breathable fabrics. Uniforms and other work clothing in darker colors can decrease anxiety and discomfort related to the fear of leaking[106] and can reduce potential humiliation or harassment if a leak does occur.[107] Access to lockers or other options to store and change into backup clothing also reduces this anxiety. Menstruators may experience fatigue because of hormone fluctuations; these workers may also need access to quiet spaces for short-term rest or the ability to sit, stand up, or stretch.[108]

Symptoms on Women in the Workplace, Mayo Clinic Proc. 4–5 (2023), https://www.mayoclinicproceedings.org/pb-assets/Health%20Advance/journals/jmcp/JMCP4097_proof.pdf [https://perma.cc/5P9P-42UT] (revealing that some (peri)menopausal women reported "quitting/retiring/changing jobs" in the prior six months due to related symptoms).

[105] *See* Columbia University Mailman School of Public Health, *The Period Posse Presents: "Changing the Norm: Mainstreaming Female Friendly Toilets*,*"* YouTube, at 32:32 (Nov. 13, 2019), https://youtu.be/zudAyQgVqv8 [https://perma.cc/YX6W-4WL8] (defining a "female-friendly toilet"); Margaret L. Schmitt, David Clatworthy, Tom Ogello, & Marni Sommer, *Making the Case for a Female-Friendly Toilet*, 10 Water 1193, 1194–99 (2018).

[106] *See* Karin, *Addressing Periods*, *supra* note 24, at 452, 505 (noting that some Indonesian factory workers who menstruate switched to darker colored clothes to make it more difficult to see menstrual stains at work); *see also* Karin, Johnson, & Cooper, *Menstrual Dignity and the Bar Exam*, *supra* note 24, at 30–31, 41–42 and nn. 144–49 (documenting the anxiety, fear of leakage, and other detrimental impacts that were expressed by lawyers and law students in response to a survey about state licensing board policies that denied menstrual products and bathroom access to test takers).

[107] For example, in *Nathan v. Great Lakes Water Authority*, a security officer alleged that she was harassed by her coworkers after she was denied leave when her period arrived prematurely and soaked through her pants. Nathan v. Great Lakes Water Auth., No. 19-cv-10131, 2020 U.S. Dist. LEXIS 100625, at *27–29 (E.D. Mich. June 9, 2020).

[108] *See* Brit. Standard Inst., BS 30416, Menstruation, Menstrual Health and Menopause in the Workplace § 5.2 (2023).

Workers may also need to take time during their workday to address their period flow or other symptoms, or to travel to menstrual-friendly spaces.[109] For example, they may need frequent and immediate (i.e., unscheduled) restroom access if a period arrives unexpectedly or is heavier than typical. Additionally, if a period begins unexpectedly, and workplace restrooms do not provide menstrual products, workers may need to take an immediate short break to leave a workplace to locate or purchase the necessary products. Some workers with more severe menstrual symptoms might need flexible schedules or to telework on certain days of their cycle. Further, workers with menstrual conditions requiring medical treatment may need schedule modifications, or time off work, to attend medical appointments.

Many workers can, of course, access restrooms or drink water as needed without formal accommodations. Some workers also have the discretion to rearrange their schedules to attend medical appointments, to work from home as desired, or to wear clothes of their choosing. But other workers, especially low-wage workers, do not have the latitude to simply leave a workstation to access a restroom or get a drink, let alone leave the worksite to purchase period supplies or work remotely. (As discussed in subpart IV.B, pre-existing workplace safety laws *should* provide regular access to the restroom, but these laws are not effectively enforced.) Low-wage workers are disproportionately people of color, who also experience menstruation-related conditions at higher rates.[110] This means supervisors may refuse such requests based on racism, as well as sexism or (in the case of menopause) age-based animus, or subject workers who request or use accommodations to harassment or ridicule.[111] Therefore, menstruating workers in highly controlled or regulated workplaces often face the untenable choice of enduring discomfort and embarrassment from visible menstrual leakage, excessive sweating, physical pain, and risk of infection, or facing potential discipline, harassment, or even termination for taking steps to manage these basic bodily functions.

II. Menstruation Discrimination

The PWFA regulations—discussed in Part III—are notable as the *first* explicit recognition in American law of an affirmative duty to accommodate some menstruation-related needs. PWFA requires reasonable accommodations for "pregnancy, childbirth, or related medical conditions."[112] The general background on menstruation reviewed above provides ample support for the

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[109] As noted above, on average products need to be changed every two to six hours, but it can be as frequent as once an hour. *See* sources cited *supra* note 55. The failure to change products as needed "can cause irritation, infection, or even toxic shock syndrome" that may impact work performance. Karin, Johnson, & Cooper, *Menstrual Dignity and the Bar Exam*, *supra* note 24, at 43.

[110] *See supra* notes 43, 69.

[111] *See infra* text accompanying notes 148–49.

[112] 42 U.S.C. § 2000gg-1(1).

EEOC's conclusion that many menstruation-related medical conditions are properly recognized as "related" to pregnancy. The EEOC's interpretation is also supported by prior judicial and administrative interpretations of Title VII's general prohibition on sex discrimination, as well as the specific language added by the PDA, in cases concerning menstruation. This Part reviews this jurisprudence.

A. Title VII's Application to Sex-Specific Traits

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "sex," along with race, color, national origin, and religion.[113] Initially, federal regulators and courts were unsure how to apply the statute to sex-specific traits, such as pregnancy or menstruation. As the EEOC acknowledged in its first annual report to Congress on Title VII, the "comparator" approach it generally applied to the new law did not work, as there was no "analogous male counterpart" for a pregnant woman.[114] This issue was especially significant because, at that time, employee benefits plans related to health frequently excluded coverage of pregnancy, childbirth, and related conditions.[115] Additionally, employers often fired workers as soon as their pregnancies began to show or required them to take unpaid leave during pregnancy and a postpartum period.[116]

In the years immediately after Title VII became effective, women brought numerous lawsuits alleging that various forms of pregnancy discrimination violated the statute. In 1972, the EEOC released guidance indicating that written or unwritten policies excluding women on the basis of pregnancy were a form of sex discrimination and that pregnancy and related conditions must be treated comparably to other health conditions in employer policies.[117] Lower courts followed the EEOC's lead and held that such policies were unlawful.[118] In 1976, however, the Supreme Court rejected this interpretation; although

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[113] 42 U.S.C. § 2000e-2(a)(1).

[114] Equal Emp. Opportunity Comm'n, First Annual Report to Congress for Fiscal Years 1965-66, H.R. Doc. No. 90-86, at 40 (1967) ("The prohibition against sex discrimination is especially difficult to apply with respect to the female employees who become pregnant. In all other questions involving sex discrimination, the underlying principle is essentially equality of treatment . . . . The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely."); *see also* Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act,* 46 U.C. Davis L. Rev. 961, 979–84 (2013) (discussing early case law under Title VII concerning pregnancy). In the 1960s, the reality that non-cisgender women can become pregnant was not considered.

[115] Widiss, Gilbert *Redux*, *supra* note 114, at 988.

[116] *See id.* at 971–72.

[117] *Id.* at 990–91 (discussing the EEOC's guidance).

[118] *See, e.g.*, Commc'n Workers of Am. v. Am. Tele. & Telegraph Co., 513 F.2d 1024, 1031 (2d Cir. 1975) (holding that exclusion of pregnancy from employer disability policy violated Title VII); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 207 (3d Cir. 1975) (same); Farkas v. S.W. City Sch. Dist., No. C2 73-169, 1974 WL 225, at *3 (S.D. Ohio Apr. 8, 1974) (holding that failure to pay pregnant employees for sick days violated Title

it acknowledged that an insurance policy denying coverage for pregnancy treated pregnant women differently from "nonpregnant persons," it reasoned that because the latter group included both men and women, the policy was not sex discrimination.[119]

Just two years later, Congress overrode the Supreme Court's unduly narrow interpretation of Title VII by enacting the Pregnancy Discrimination Act (PDA). The PDA amended the definition of "sex" in Title VII to specify that it includes discrimination on the basis of "pregnancy, childbirth, or related medical conditions."[120] Congress used the same phrase in PWFA. When Congress borrows language from a previous statute, especially one in a closely related area, courts generally presume that the language should be interpreted consistently.[121] Thus, the interpretation of this language in the PDA is an important touchpoint for considering the meaning of the same phrase in PWFA.

The PDA also specifically provides that workers with limitations caused by "pregnancy, childbirth, or related medical conditions" must be treated "the same" as other persons "similar in their ability or inability to work."[122] This provision creates a comparative accommodation mandate—if an employer provides support for conditions that cause limitations *like those* caused by pregnancy or related conditions, the employer often must provide comparable assistance for pregnancy-related conditions.[123]

The legislative history of the PDA suggests that the full menstrual cycle—from menarche to menopause—could be included within the ambit of "related medical conditions." The Senate committee report states that the PDA "defines sex discrimination . . . to include these *physiological occurrences peculiar to women.*"[124] Similarly, the House's committee report indicates that

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VII), *aff'd*, 506 F.2d 1400 (6th Cir. 1974); *see also* Widiss, Gilbert *Redux*, *supra* note 114, at 991–93.

[119] *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135–36 (1976) (citation omitted) (holding exclusion of pregnancy from disability policy did not violate Title VII).

[120] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

[121] *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); Lorillard v. Pons, 434 U.S. 575, 581 (1978) (stating that when Congress adopts a "new law incorporating sections of a prior law," Congress "normally can be presumed" to adopt interpretations of the prior law as well).

[122] 42 U.S.C. § 2000e(k).

[123] There was considerable disagreement in the lower courts regarding how this requirement applied, particularly when an employer accommodates some but not all comparable conditions. The Court considered this question much later in *Young v. United Parcel Service, Inc.*, where it crafted a standard that reflected a modified version of the *McDonnell Douglas* test typically used in intentional discrimination cases. *See* 575 U.S. 206, 229–30 (2015). This standard created further confusion, helping bolster support for state PWFAs and ultimately the federal PWFA. *See generally* Widiss, *PWFAs in Red and Blue America*, *supra* note 21.

[124] S. Rep. No. 95-331, at 3–4 (1977) (emphasis added). In the late 1970s, the committee unsurprisingly did not consider the possibility that persons who do not identify as women (including trans-men, genderqueer, or nonbinary persons) might experience

"[i]n using the broad phrase '. . . pregnancy, childbirth and related medical conditions,' the bill makes clear that its protection extends to the *whole range of matters concerning the childbearing process.*"[125] In 2012, in litigation regarding the scope of the PDA, the EEOC cited this legislative history to support the claim that lactation is a "related medical condition,"[126] a conclusion now well-established in case law.[127]

B. Menstruation-Related Case Law Under Title VII, as Amended by the PDA

In the years since Title VII was enacted, several cases have considered how the statute's general prohibition on sex-based discrimination, as well as the language added by the PDA, apply to menstruation and related conditions. Some of these cases have challenged exclusion from the workplace based on menstruation; others have contested menstruation-based harassment; and some have challenged failures to accommodate menstruation-related needs. This section reviews the key treatments of the issue in reported case law.[128] This review of case law bolsters the EEOC's explicit reference to menstruation in the PWFA regulations. It also bolsters other recent administrative interpretations, issued during the Biden Administration, indicating that menstruation may be unlawful sex discrimination and that accommodations will often be required, even in the absence of an explicit mandate such as PWFA.

One of the most thorough examinations of menstruation discrimination at work is *Harper v. Thiokol Chemical Corporation.*[129] In this 1980 case, the employee Harper challenged a Thiokol company policy that required women who had been on maternity leave to provide proof of having experienced a "normal menstrual cycle" before returning to work.[130] Harper applied for and received maternity leave during her pregnancy.[131] She subsequently miscarried; when she sought to return to work, her request was denied, and she was

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pregnancy, childbirth, or related medical conditions. PWFA is gender neutral, meaning any person that experiences limitations related to these conditions should be able to seek accommodations. That said, the interpretation of "related medical conditions" as encompassing the range of conditions that make up the reproductive process of those assigned female at birth remains applicable. Likewise, the sex-based stigma that many of these conditions evoke stands as a barrier to sex-based equality more generally.

[125] H.R. Rep. No. 95-948, at 5 (1978) (emphasis added).

[126] Brief for Plaintiff-Appellant at *23, Equal Emp. Opportunity Comm'n v. Houston Funding II, Ltd., 717 F.3d 425 (5th Cir. 2013) (No. 12-20220).

[127] *See, e.g.*, *Houston Funding*, 717 F.3d at 428 ("[W]e hold that lactation is a related medical condition of pregnancy for purposes of the PDA."); Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1259 (11th Cir. 2017) ("[L]actation is a related medical condition and therefore covered under the PDA.").

[128] The relatively small universe of cases likely reflects the historical silence surrounding menstruation, meaning even those who are treated unfairly at work or denied accommodations based on these conditions may be unlikely to bring legal actions.

[129] 619 F.2d 489 (5th Cir. 1980).

[130] *Id.* at 490–92.

[131] *Id.*

ultimately terminated because her periods had not yet returned prior to the expiration of her maternity leave.[132]

The relevant events in *Harper* occurred before the PDA was enacted. The Fifth Circuit nonetheless concluded—properly, we believe—that Harper's termination violated Title VII's more general prohibition on sex-based discrimination, because the Thiokol policy unfairly burdened women but not men.[133] In reaching its conclusion that menstruation discrimination was illegal, the *Harper* court suggested that Thiokol's policy violated the EEOC's pre-PDA guidance concerning pregnancy.[134] As the Fifth Circuit later observed, the *Harper* court thus "did, at least implicitly, hold that menstruation was 'pregnancy, childbirth or [a] related medical condition.'"[135] The Fifth Circuit made this observation in its 2013 decision in *Equal Employment Opportunity Commission v. Houston Funding II, Ltd.*, which involved the question of whether lactation is a "related medical condition."[136] The *Houston Funding* decision further concluded that, "as *both menstruation* and lactation are *aspects of female physiology that are affected by pregnancy, each seems to fit readily into a reasonable definition of 'pregnancy, childbirth, or related medical conditions.*'"[137]

A much more recent case, *Flores v. Virginia Department of Corrections*, decided in 2021, likewise concludes that menstruation discrimination is sex discrimination, and also that it may implicate the PDA.[138] Plaintiff Flores was a dental hygienist who worked at a Virginia state correctional facility. As part of the standard entrance procedure, Flores had passed through the facility's body scanner with a saturated tampon. After entering, she removed and replaced this used tampon; later in the same day, she removed the second tampon and used tissue paper in her underwear as a stopgap measure because she had not brought another tampon to the restroom with her.[139] As a result of this routine series of events, Flores was accused of smuggling contraband into the facility because a subsequent body scan revealed that she had removed

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[132] *Id.* at 490–91.

[133] *Id*. at 491–93. The *Harper* court relied primarily on Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), to distinguish the exclusionary policy from the kind of fringe benefit policy found permissible in Gen. Elec. Co. v. Gilbert, 429 U.S. 126 (1976). *Id*. at 491.

[134] *See Harper*, 619 F.2d at 493 n.2. Although in *Gilbert*, the Supreme Court rejected the EEOC's 1972 guidelines interpreting Title VII as applied to pregnancy, Congress's enactment of the PDA, overriding *Gilbert,* ratified Congress's agreement with the EEOC that discrimination on the basis of pregnancy, childbirth, and related medical conditions is a form of discrimination on the basis of sex, while purposefully adopting a broader standard that applied beyond the specific context of disability insurance or sick leave. *See* Widiss, Gilbert *Redux*, *supra* note 114, at 990–94.

[135] Equal Emp. Opportunity Comm'n v. Houston Funding II, Ltd., 717 F.3d 425, 429 (5th Cir. 2013).

[136] *Id.*

[137] *Id.* at 429–30 (emphasis added).

[138] Flores v. Va. Dep't of Corr., No. 20-cv-00087, 2021 WL 668802, at *3 (W.D. Va. Feb. 22, 2021).

[139] *Id.* at *2.

something—that is, the tampon—from her vagina.[140] Although Flores explained what had happened and showed a female security guard the tissue paper with menstrual blood on it, she was still interrogated at length, and her car and work area were searched. No contraband was found, but Flores was terminated due to "suspicion of contraband."[141]

The *Flores* court observed that "there is a strong argument that menstruation is a 'related medical condition' to pregnancy and childbirth under the PDA," noting that it is "inarguably an integral part of the female reproductive cycle," "necessary" for the potential of pregnancy, and that various "menstrual disorders . . . can affect a woman's capability to become pregnant."[142] Ultimately, the court held that it was not necessary to reach the legal question of the PDA's applicability because the alleged facts demonstrated that "but for" Flores's menstruation and use of a tampon—"conditions inextricable from her sex and child-bearing capacity"—she would not have been fired; the court therefore held that her complaint stated a claim under Title VII's general prohibition on sex discrimination.[143]

Courts have also recognized that harassment including pejorative references to menstruation, perimenopause, or menopause may constitute sex discrimination. For example, in *Hiebert v. Minetta,* in 2003, the EEOC backed an Administrative Law Judge's conclusion that a federal agency's toleration of "sexist comments and jokes . . . including . . . a written joke about PMS and a joke called 'The Gift,'" both of which were passed around the office, created "a hostile work environment based on sexual harassment or gender based harassment."[144] Similarly, in its 2004 decision in *Baker v. John Morrell Co.*, the Eighth Circuit recognized that repeated mocking of a female employee related to her need to access a restroom for menstruation management, denial of that access such that on at least one occasion she "menstruated through her pants," and other evidence of non-menstruation-related-sex-based harassment were sufficient to constitute "blatant sexual harassment."[145]

There are also cases in which female employees' complaints about the workplace are dismissed or minimized based on stereotypes concerning the supposed moodiness of menstruating or perimenopausal women. For example, in a 2004 case, *Petrosino v. Bell Atlantic*, the complainant Petrosino's supervisor accused her "of being 'on the rag' . . . whenever [she] had a dispute with him."[146] The Second Circuit denied Bell Atlantic's motion for summary

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[140] *Id*. at *2–3.
[141] *Id.* at *3.
[142] *Id.* at *4.
[143] *Id.* at *6.
[144] Hiebert v. Mineta, Appeal No. 01A05253, 2003 WL 21302525 (Equal Emp. Opportunity Comm'n Off. of Fed. Ops. May 30, 2003).
[145] Baker v. John Morrell & Co., 382 F.3d 816, 821, 829 (8th Cir. 2004).
[146] Petrosino v. Bell Atlantic, 385 F.3d 210, 215 (2d Cir. 2004); *see also* Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 196 (4th Cir. 2000) (holding repeatedly asking plaintiff if she was "on the rag," together with other harassing conduct, could support a viable claim of discrimination on the basis of sex).

judgement on Petrosino's harassment claim, citing the "link" that her supervisors and co-workers drew "between their perceptions of Petrosino's professional defects and her anatomy, especially their vulgar references to her breasts and menstrual cycle," as well as other forms of harassing conduct.[147] The sexism implicit in such comments often intersects with other forms of discrimination, such as in *Bailey v. Henderson*, a case from 2000 that involved a Black woman's complaints about harassing conduct being written off dismissively as "just some black women [*sic*] going through menopause."[148] The D.C. District Court deemed this comment, combined with other non-menstruation-related harassment, sufficient to state a viable sex-based harassment claim.[149]

However, a handful of courts have reasoned differently. In 2017, in *Coleman v. Bobby Dodd Institute*, the Middle District of Georgia recognized that a "non-frivolous argument" could be made that the PDA applied to "pre-menopausal menstruation," but ultimately held (incorrectly, we contend) that the claim required a male comparator.[150] Plaintiff Coleman was a pre-menopausal employee of the Bobby Dodd Institute who experienced "uncontrollably heavy menstrual bleeding" at work.[151] On one occasion, she soiled her office chair and later the carpet due to heavy menstrual flow. She was subsequently fired for "failing to maintain high standards of personal hygiene."[152] Coleman alleged the termination—caused by the "uniquely feminine condition" of menstruation—was sufficient to demonstrate sex discrimination.[153] The court disagreed, holding the claim was only viable if Coleman could show that men who "soiled themselves and company property due to a medical condition, such as incontinence," would be treated more favorably.[154] The ACLU, which was representing Coleman, appealed the decision, and the case settled while the appeal was pending.[155] In a much older case, a New York district court decision asserted without analysis that "menstrual cramps are not a medical condition related to pregnancy or childbirth"; this statement, however, was dicta since ultimately the employee was terminated primarily for unrelated reasons.[156]

Of course, in these pre-PWFA cases, even when courts *did* recognize menstruation, perimenopause, or menopause as a "related medical condition" to pregnancy under the PDA, an employee seeking an accommodation would generally need to identify other employees in the workplace with similar

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[147] *Petrosino*, 385 F.3d at 224.
[148] Bailey v. Henderson, 94 F. Supp. 2d 68, 71 (D.D.C. 2000).
[149] *See id.* at 75–76.
[150] Coleman v. Bobby Dodd Inst., No. 17-CV-29, 2017 WL 2486080, at *1–2 (M.D. Ga. June 8, 2017).
[151] *Id.* at *1.
[152] *Id.*
[153] *Id.*
[154] *Id.* at *2.
[155] Raisa Habersham, *Woman Settles With Employer She Says Fired Her For Getting Period at Work*, Atlanta J. Const., (Nov. 16, 2017), https://www.ajc.com/news/crime--law/woman-settles-with-employer-she-says-fired-her-for-getting-period-work/afsPqA1kEa6mz0erIGMNaO/ [https://perma.cc/H78B-KSKT].
[156] Jirak v. Fed. Express Corp., 805 F. Supp. 193, 195 (S.D.N.Y. 1992).

limitations who received comparable support. For example, in a 2019 case *Betancourt v. Margaritaville Hollywood Beach Resort, L.P.*, plaintiff Betancourt was a restaurant server whose period arrived unexpectedly.[157] Her supervisor refused her requests for a break to obtain a menstrual product, which caused her to leak through her clothes.[158] Colleagues and customers noticed, and she was later criticized for being "nasty" and told not to arrive for another shift "like that."[159] The court held that her complaint failed because, although she alleged other servers were allowed to leave the restaurant during their shift to address "non-gender related hygienic" issues in the bathroom, she did not specify that those "individuals [were] *outside* her protected class (i.e., males)."[160] Betancourt was granted leave to refile because she "came close to properly pleading" a sex discrimination claim.[161]

Since it is often difficult to identify a comparator that courts deem sufficiently similar, employees seeking accommodations for menstruation-related needs have more frequently brought claims under the Americans with Disabilities Act (ADA).[162] In this context, as with pregnancy, courts routinely make a distinction between "normal" menstruation or menopause and menstruation- or menopause-related complications or conditions. For example, in *Sipple v. Crossmark*, a 2012 case, a product demonstrator for a food company began to experience "hot flashes, dizziness," and other menopausal symptoms.[163] She brought her employer a note from her physician asking that she be allowed to modify the dress code to mitigate these symptoms, but her request was denied.[164] She subsequently sued under California's analog to the ADA, but the court held "[m]enopause is a natural progression over time," and therefore not "a disability per se."[165] By contrast, in cases where employees experience menopausal symptoms brought on by hysterectomies, courts are often willing to recognize an impairment protected by the ADA.[166]

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[157] Betancourt v. Margaritaville Hollywood Beach Resort, L.P., No. 18-cv-62538, 2019 WL 2119611, at *1 (S.D. Fla. Mar. 29, 2019).

[158] *Id.*

[159] *Id.*

[160] *Id.* at *4 (emphasis in original).

[161] *Id.*

[162] 42 U.S.C. §§ 12101–12213.

[163] Sipple v. Crossmark, Inc., No. 2:10-cv-00570, 2012 WL 2798791, at *1 (E.D. Cal. July 9, 2012).

[164] *Id.* at *2–3.

[165] *Id.* at *5

[166] *See, e.g.*, Mullen v. New Balance Athletics, Inc., No. 1:17-cv-194, 2019 WL 958370, at *5 (D. Me. Feb. 27, 2019) (determining early menopause brought on at age 35 following a hysterectomy could constitute an "impairment" that qualified as a disability); Hubbard v. Day & Zimmermann Hawthorne Corp., No. 3:12-cv-00681, 2015 WL 1281629, at *5 (D. Nev. Mar. 20, 2015) (finding menopausal symptoms brought on by a hysterectomy to treat cancer "sufficient to create a genuine issue of material fact as to whether" they constitute a disability).

Likewise, employees with menstruation-related disorders can sometimes find relief under disability laws.[167]

In sum, courts have properly interpreted Title VII and the PDA to offer relief when workers experience discrimination or harassment based on menstruation. However, employees seeking menstruation-related accommodations at work face the same challenges that pregnant workers did prior to the enactment of PWFA. Under Title VII, as amended by the PDA, accommodations are only available if the menstruator can identify a non-menstruating comparator. Additionally, although certain complications or conditions related to menstruation may be recognized as disabilities and accommodated under the ADA, "normal" menstruation and menopause are not.

III. Menstruation Accommodations

PWFA is a major new civil rights law that provides workers essential support for a wide range of needs connected to pregnancy, childbirth, and related medical conditions. PWFA took effect on June 27, 2023.[168] In April 2024, the EEOC issued final regulations implementing PWFA, which became effective on June 18, 2024.[169] These regulations and accompanying interpretive guidance, as well as the preamble for the final rule, provide extensive discussion of how the EEOC interprets PWFA's requirement that employers supply accommodations for "pregnancy, childbirth, or related medical conditions."[170] This

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[167] *See, e.g.*, Schmidt v. Solis, 891 F. Supp. 2d 72, 75–76, 86–95 (D.D.C. 2012) (holding that Plaintiff's endometriosis, which caused "abnormal, painful" menstrual cycles often including "profuse and uncontrollable bleeding," as well as serious side effects caused by a medication she was taking to address the condition, qualifies as a disability under the Rehabilitation Act).

[168] 42 U.S.C. § 2000gg. The State of Texas has filed a lawsuit alleging that PWFA is unconstitutional because it was passed with the use of proxy votes. *See* Texas v. Garland, 719 F. Supp. 3d 521, 599 (N.D. Tex. 2024) (enjoining enforcement of the PWFA against the State of Texas), *appeal docketed sub nom.*, Texas v. Bondi, No. 24-10386 (5th Cir. May 1, 2024).

[169] *See Implementation of the Pregnant Workers Fairness Act*, 89 Fed. Reg. 29096, 29096 (Apr. 19, 2024) (specifying effective date of June 18, 2024). Coalitions of generally conservative states and some religious employers have filed litigation seeking to enjoin aspects of the final rule; however, the pending challenges address factors other than the potential application to menstruation. *See* Cath. Benefits Ass'n v. Burrows, 732 F. Supp. 3d 1014, 1029–30 (D.N.D. 2024) (preliminary injunction issued preventing the EEOC from "interpreting or enforcing" PWFA claims related to "abortion or infertility treatments that are contrary to the Catholic faith" against certain religious employers); Louisiana v. Equal Emp. Opportunity Comm'n, 705 F. Supp. 3d 643, 664 (W.D. La. June 17, 2024) (preliminary injunction issued under which some employers are not required to provide accommodations for "elective abortions . . . that are not necessary to treat a medical condition related to pregnancy"); State v. Equal Emp. Opportunity Comm'n, 129 F.4th 452, 458 (8th Cir. 2025) (reversing dismissal of lawsuit that alleged that the EEOC exceeded its statutory authority by interpreting PWFA to require accommodations for abortion and remanding for further proceedings).

[170] 29 C.F.R. pt. 1636.3. Commissioner Andrea Lucas backed elements of the rule but ultimately disagreed with the scope of coverage included and voted against it. *See* Memo to Charlotte Burrows, Equal Emp. Opportunity Comm'n Chair, et al., from Andrea Lucas,

Part provides a brief overview of PWFA's statutory and regulatory structure,[171] and then it discusses in more detail PWFA's application to menstruation-related needs. This Part also highlights other recent administrative guidance that likewise addresses menstruation-related needs within the workplace.

Before turning to substance, we note as a preliminary matter that courts should give the EEOC's administrative interpretations of the new statute *Skidmore* deference, the standard recently reaffirmed in *Loper Bright v. Raimondo*.[172] PWFA grants explicit authority to the EEOC to issue regulations to implement the statute.[173] The PWFA regulations were promulgated very soon after PWFA was enacted, and the rules reflect the Commission's thorough, careful consideration of relevant substantive issues as well as its expertise implementing similar employment laws. The Commission's interpretation of the key language concerning "pregnancy, childbirth, or related medical conditions" is also consistent with its long-standing interpretation of analogous language in the PDA.

A. PWFA's Reasonable Accommodation Mandate

PWFA requires covered employers (generally employers with at least fifteen employees)[174] to provide "reasonable accommodations" to a "qualified employee" for "known limitations related to . . . pregnancy, childbirth, or related medical conditions," unless doing so would "impose an undue hardship" on the employer.[175] The reasonable accommodation/undue hardship standard generally parallels disability law.[176] That said, PWFA departs from the ADA in ways that matter for its application to menstruation-related needs.

Equal Emp. Opportunity Comm'n Chair, Statement re: Vote on Final Rule to Implement the Pregnant Workers Fairness Act (April 4, 2024), available at https://www.linkedin.com/posts/andrea-lucas-a5b27513_a-lucas-statement-re-vote-re-pwfa-final-activity-7185711161609232387-GtB1/ [https://perma.cc/E2WF-87EC] (indicating Commissioner Lucas disagreed with the Commission's conclusion that case law interpreting the phrase "pregnancy, childbirth, or related medical conditions" in the context of the PDA generally applied to interpreting the same phrase in PWFA).

[171] For a more extensive discussion of PWFA generally, *see* Widiss, *Federal PWFA*, *supra* note 21.

[172] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (suggesting courts should give weight to agency interpretations based on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade"); *see also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024) (reaffirming centrality of *Skidmore* deference in statutory interpretation and also suggesting that "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning").

[173] *See* 42 U.S.C. § 2000gg-2(a).

[174] *See id.* § 2000gg(2)(B)(i).

[175] *Id.* § 2000gg-1(1).

[176] PWFA incorporates the ADA's statutory definitions for these terms, *see* 42 U.S.C. § 2000gg(7), but also specifies that these words should be interpreted in light of the EEOC's regulations for PWFA. *See id.* § 2000gg-3(a) (requiring that the EEOC's rules interpreting

PWFA defines a "known limitation" as any "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," and the statute specifies that such limitations are covered "*whether or not such condition meets the definition of disability* specified [in the ADA]."[177] In other words, PWFA is designed to cover a broad spectrum of limitations and clearly does *not* require a showing of an "impairment" that is "substantially limit[ing]" as those terms are understood in the ADA context.[178] PWFA also explicitly provides that an employee may be deemed "qualified" for a job even if they are unable to perform an essential function of that job for a "temporary period."[179] These statutory provisions make clear that even limitations that cause relatively short-term and minor limitations (like needing regular access to a restroom) may be covered by PWFA. These deviations from the ADA make sense given PWFA's different focus; PWFA is meant to provide support for conditions that, by their nature, are often short in duration, and that may or may not be substantially limiting. The EEOC confirms this interpretation with regulatory language specifying that limitations may be "modest, minor, and/or episodic."[180]

To be eligible for support under PWFA, the condition must be "known" to the employer.[181] This means that an employee needs to communicate to a manager, human resources representative, or other appropriate person that she needs some kind of help or modification of workplace rules for a reason that is related to a covered condition.[182] An employee does not need to use "magic words," reference PWFA specifically, or disclose a specific medical diagnosis.[183] Once a covered need has been communicated, the worker and the employer are generally expected to engage in an "[i]nteractive process" to determine an appropriate response.[184] This process may be "informal."[185] For example, if an employee tells her manager that she needs to leave early to go

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PWFA "shall provide examples of reasonable accommodations" that could be applied in this context).

[177] *Compare* 42 U.S.C. § 2000gg(4) (emphasis added), *with id.* § 12102(1) (defining disability for ADA coverage).

[178] *Cf. id.* (providing that disability under the ADA means a "physical or mental impairment that substantially limits one or more major life activities" of an individual, or a record of or being regarded as having such an impairment).

[179] 42 U.S.C. § 2000gg(6).

[180] 29 C.F.R. § 1636.3(a)(2).

[181] *Id.* § 1636.3(a)(1).

[182] *See id.* § 1636.3(d)(2).

[183] *Cf.* Leeds v. Potter, 249 F. App'x 442, 449–50 (6th Cir. 2007) ("[A]n employee need not use the magic words 'accommodation' or even 'disability,' [but] the request does need to make it clear from the context that it is being made in order to conform with existing medical restrictions." (citation omitted)); *see also* 29 C.F.R. § 1636.3(d)(2) (specifying that a request for an accommodation "need not be in writing, be in a specific format, use specific words, or be on a specific form in order for it to be considered 'communicated to the employer'").

[184] 29 C.F.R. § 1636.3(k).

[185] *Id.* (specifying that there are "no rigid steps that must be followed" to obtain an accommodation).

to a doctor's appointment and her supervisor permits it, PWFA's statutory requirements have been satisfied.

The PWFA regulations identify four routine accommodations that are presumptively "reasonable" accommodations for pregnant employees: additional bathroom breaks, access to water at a workstation, breaks to eat or drink, and permission to sit or stand as needed.[186] The regulations characterize these measures as "predictable assessments," and assert that in "virtually all cases," these modifications will be reasonable and not deemed to cause undue hardship.[187] The PWFA regulations also list numerous other workplace accommodations that may be appropriate, including permission to work remotely, modification of a uniform, time off to receive healthcare treatment, adjustments to work requirements to alleviate pain, and temporarily suspending one or more essential functions of the job.[188]

The regulations make clear that employers are not required to ask for medical documentation before granting such requests, and that they are only permitted to ask for documentation that is "reasonable," and when the worker's need is not "obvious."[189] Employers should recognize that obtaining documentation can be expensive and time consuming for employees. The EEOC determined that unnecessarily onerous documentation requests could be deemed an interference with PWFA rights, exposing the employer to liability under the statute's anti-coercion provisions.[190] Relatedly, employers may need to provide interim accommodations while an employee attempts to secure appropriate documentation.[191] Access to interim accommodations is particularly important since many needs covered by PWFA are time-sensitive. Finally, along with other anti-retaliation protections,[192] workers are protected from adverse employment actions for seeking or using an accommodation pursuant to PWFA.[193]

B. Menstruation under PWFA

Under PWFA, employers generally must provide reasonable accommodations for "pregnancy, childbirth, or related medical conditions."[194] This phrase is not defined in the statute, but the regulations discuss its meaning in detail. In the regulations, the EEOC defines "related medical conditions" as "medical conditions relating to the pregnancy or childbirth of the specific employee

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[186] 29 C.F.R. § 1636.3(j)(4).
[187] *Id*.
[188] *Id.* § 1636.3(i)(2).
[189] *Id.* § 1636.3(*l*)(1)).
[190] *Id.* at app. § 1636.5(f)(2) (para. 14); *see also* 42 U.S.C. § 2000gg-2(f)(2).
[191] 29 C.F.R. § 1636.4(a)(1)(vii).
[192] 42 U.S.C. § 2000gg-2(f); 29 C.F.R. §§ 1636.4(e), 1636.5(f).
[193] 42 U.S.C. § 2000gg-1(5); 29 C.F.R. § 1636.4(e).
[194] 42 U.S.C. § 2000gg-1(1).

in question,"[195] and it enumerates many conditions that may fall within this definition, while also explicitly stating that the list is not exhaustive.[196] Among the conditions listed that PWFA may address are: "menstruation," "contraception," "endometriosis," and "vaginal bleeding."[197] The regulation also clarifies that the reference to pregnancy includes "potential or intended pregnancy," and, accordingly, that conditions causing infertility are generally within the scope of PWFA.[198] Similarly, the PWFA regulations specify that pregnancy loss, via "miscarriage, stillbirth, or abortion," is likewise within the ambit of the statute;[199] such losses can cause significant bleeding that may be experienced as an unusually heavy period.[200]

In the preamble to the regulations, the EEOC directly discusses menstruation as a "related medical condition."[201] The Commission cites several of the cases discussed in Part II and concludes, appropriately, that the "majority of [cases addressing whether menstruation falls within the 'related medical conditions' language of the PDA] illustrate that, at a minimum, menstruation is covered … when it has a nexus to a current or prior pregnancy or childbirth."[202] The preamble also makes the important point that even if "in a particular case," a court were to deem a menstruation-related need to be outside the ambit of "pregnancy, childbirth, or related medical conditions," "discrimination

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[195] 29 C.F.R. § 1636.3(b).

[196] *Id.*

[197] *Id*.

[198] *Id.*

[199] *Id.*

[200] *See Pregnancy Loss (Before 20 Weeks of Pregnancy)*, Nat'l Inst. of child Health & Hum. Dev. (2017), https://www.nichd.nih.gov/health/topics/factsheets/pregnancyloss [https://perma.cc/69DA-5JYV] (observing that women experiencing miscarriages "are at risk for bleeding, pain, and infection," particularly if the miscarriage does not completely empty the uterus of pregnancy tissue); *see also* Simon-Hermann Enzelsberger, Daniela Wetzlmair, Philipp Hermann, Helga Wagner, Omar Shebl, Peter Oppelt, & Philip Sebastian Trautner, *Bleeding Pattern After Medical Management of Early Pregnancy Loss With Mifepristone–Misoprostol and its Prognostic Value: A Prospective Observational Cohort Study*, Archives Gynecology & Obstetrics, 349, 353–54 (2021), (noting the lack of research on the amount of bleeding post-miscarriage).

[201] *Implementation of the Pregnant Workers Fairness Act*, 89 Fed. Reg. 29096, 29101 (Apr. 19, 2024).

[202] *Id*. As noted above, the authors of this Article submitted a comment to the EEOC regarding how menstruation relates to pregnancy and likewise discussing this case law. *See* Karin & Widiss, *Comment*, *supra* note 24. Other comments similarly discussed how PWFA relates to menstruation. *See, e.g.*, Period Law, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act (Oct. 10, 2023), https://www.regulations.gov/comment/EEOC-2023-0004-97978 [https://perma.cc/SK6B-KD2H]; Birnbaum Women's Leadership Ctr. at NYU Sch. of L., Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act (Oct. 10, 2023), https://www.regulations.gov/comment/EEOC-2023-0004-97648 [https://perma.cc/9DMA-YQTU]; The Legal Aid Society, Comment Letter on Regulations to Implement the Pregnant Workers Fairness Act (Oct. 10, 2023), https://www.regulations.gov/comment/EEOC-2023-0004-98278 [https://perma.cc/BU9Q-N7TR].

based on that condition could nevertheless violate Title VII's prohibition on sex discrimination."[203]

The explicit reference to menstruation in the PWFA regulations is extremely important. As discussed in Part I, menstruation is a necessary precursor to pregnancy, and many menstrual conditions can cause infertility or jeopardize the success of a pregnancy. An employee seeking medical treatment for any such condition should be protected under PWFA. Accordingly, she could ask for schedule modifications to attend medical appointments, time off (without penalty under a point-based absence policy) if the pain or discomfort associated with such conditions makes it impossible to work for some or all of a day, or workplace accommodations that could alleviate the symptoms associated with such conditions. Similarly, a miscarriage may be experienced as a heavy or late period, and the first periods after a miscarriage may be unusually heavy and last longer than usual.[204] An employee who needs extra restroom breaks to change menstrual products after a miscarriage or time to leave a workplace to purchase appropriate products would also have a PWFA-related need that should be accommodated. Likewise, an employee who is experiencing severe hot flashes and other early menopausal symptoms after a pregnancy-related hysterectomy clearly falls within the ambit of PWFA and may seek workplace modifications accordingly.[205]

PWFA, however, is unlikely to meet the full range of menstruation-related needs that workers routinely encounter. Although, as Part I demonstrates, menstruation is necessarily and inherently "related to" pregnancy, some courts will likely deem routine period management or symptoms related to perimenopause insufficiently "related" to a "pregnancy or childbirth of the specific employee in question" to fall within the ambit of PWFA. Nonetheless, the regulations, and other recent administrative guidance discussed below, make clear employers might *still* need to provide accommodations for such menstruation-related needs under Title VII's more general prohibition on sex discrimination or other statutory requirements.[206] For example, if an employer routinely provides certain modifications—like extra breaks—to employees for other reasons, courts may find that denying such breaks for menstruation-related needs is unlawful discrimination against a menstruating or perimenopausal employee.[207] Such a holding is particularly likely if

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[203] 89 Fed. Reg. at 29101 n.40.

[204] *See* Rebecca Cohen, *What Happens After a Miscarriage? An Ob-Gyn Discusses the Options,* Am. Coll. of Obstetricians & Gynecologists (June 2022), https://www.acog.org/womens-health/experts-and-stories/the-latest/what-happens-after-a-miscarriage-an-ob-gyn-discusses-the-options [https://perma.cc/AVA4-BXD7]; Helen Berry, *Periods After Pregnancy Loss – What to Expect*, Miscarriage Ass'n (Feb. 29, 2024), https://www.miscarriageassociation.org.uk/blog/periods-after-pregnancy-loss/ [https://perma.cc/E8HB-DEUL].

[205] *See supra* notes 95–96 and accompanying text.

[206] *See supra* text accompanying note 203; *see infra* text accompanying notes 209–221.

[207] Baker v. John Morrell & Co., 220 F. Supp. 2d 1000, 1011 (N.D. Iowa 2002), *aff'd* 382 F.3d 816, 821–22, 828–29 (8th Cir. 2004) (allowing a Title VII disparate treatment

(as is often the case) such denials are accompanied by derogatory statements or harassment related to menstruation or menopause.

C. Menstruation under Other Recent Administrative Guidance

In spring 2024, during President Biden's Administration, the EEOC and other agencies released additional guidance and regulatory materials likewise confirming that menstruation-related discrimination can violate statutory provisions relating to sex discrimination, and that such discrimination can fall within the ambit of protections for pregnancy and related conditions.

Indeed, around the same time that the EEOC published the final PWFA regulations, the Commission also published updated guidance on harassment.[208] This guidance indicates that "harassment based on menstruation can constitute or contribute to a hostile work environment based on sex,"[209] and it provides an example of an employee whose supervisor repeatedly and negatively references her supposed "menopausal moment[s]" under the heading "Intersectional Harassment Based on Age and Sex."[210]

In April 2024, the federal Department of Education (DOE) included extensive discussion of menstruation-related needs in updated regulations issued to implement Title IX of the Educational Amendments Act, which prohibits sex discrimination in federally-funded educational settings.[211] Several

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sex discrimination claim to proceed when an employer allegedly provided male workers more time to use the restrooms than the plaintiff who provided medical documentation of a menstruation-related bladder problem); Equal Emp. Opportunity Comm'n v. H. S. Camp & Sons, Inc., 542 F. Supp. 411, 435, 438, 450 (M.D. Fla. 1982) (affirming a finding of sex discrimination on behalf of a plaintiff who was fired for an absence related to menstrual cramp pain that she reported using company procedures when a similarly situated male employee was only demoted (and provided a two week vacation to recover from his illness)); *cf.* Young v. UPS, 575 U.S. 206, 229 (2014) (explaining how failure to provide accommodations may violate Title VII as amended by the Pregnancy Discrimination Act).

[208] U.S. Equal Opportunity Comm'n, No. 915.064, Enforcement Guidance on Harassment in the Workplace (2024); *see also* Marcy L. Karin, Comment Letter on Proposed Guidance on Harassment in the Workplace (RIN 3046–ZA02) (Nov. 1, 2023), https://downloads.regulations.gov/EEOC-2023-0005-37268/attachment_1.pdf [https://perma.cc/ZVY4-FFW2] (advocating for the EEOC to address harassment based on menstruation and menopause in its updated guidance, including by providing clarifying examples and citing existing cases); *infra* text accompanying note 228 (discussing potential impact of President Trump's Executive Order 14,168 regarding gender ideology).

[209] Enforcement Guidance on Harassment, *supra* note 208, § III(b)(3)(a) (citing Petrosino v. Bell Atl., 385 F.3d 210, 215 (2d Cir. 2004)).

[210] *Id.* ex. 24, § II(A)(10).

[211] *See* 20 U.S.C. § 1681; *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474, 33812–14 (Apr. 29, 2024); *see also infra* text accompanying note 228 (discussing potential impact of President Trump's Executive Order 14,168 regarding gender ideology). Several lawsuits have been filed challenging the regulations' interpretation of how the statutory language applies to discrimination related to sexual orientation and gender identity. Preliminary injunctions have been granted that ban the rules from taking effect in many states while the litigation proceeds. *See, e.g.*, Tennessee v. Cardona, 737 F. Supp. 3d. 510, 570 (E.D. Ky. 2024); *see also* Dep't of Educ. v. Louisiana, 603 U.S. 866 (2024) (per curiam) (declining

written comments submitted in response to the proposed regulations asked DOE to modify the regulations to explicitly address how Title IX applies to menstruation-related discrimination, harassment, and failure to accommodate menstruation-related needs.[212] Commenters also asked DOE to consider enhanced menstrual education requirements and to protect students' privacy related to menstruation.[213] The DOE discusses these comments in the preamble to the regulation.[214] Most relevant to this discussion, the agency agreed that:

> *[d]iscrimination based on menstruation, perimenopause, menopause, or their related conditions is sex discrimination* because, depending on the facts presented, it can overlap or fall within the scope of discrimination based on pregnancy or related conditions, sex stereotypes, or sex characteristics.[215]

DOE explained that amending the Title IX regulations to specifically reference menstruation was "unnecessary" because it was "already covered," and that the discussion of menstruation in the preamble should be understood as a clarification for "schools, students, and employees," not a new standard.[216] To demonstrate that menstruation and related conditions were already covered, the DOE referenced Title VII case law discussed in Part II.[217]

Further, the DOE's April 2024 regulations confirmed that failure to grant accommodations for menstruation-related needs may constitute impermissible discrimination or a "barrier" to full and equal participation in educational opportunities, even in the absence of an explicit requirement to provide "reasonable modifications" for menstruation.[218] For example, the DOE states that schools must "allow a teacher to use a fan in a classroom to address hot flashes due to menopause" if the school allows teachers to make other classroom changes to "increase comfort for other types of reasons"; adjust "unreasonable limits on students' or employees' bathroom access"; or permit flexibility in dress codes to address menstruation-related issues.[219] The DOE also concluded that many menstruation-related needs could fall within related provisions of the Title IX regulations that prohibit discrimination on the basis

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to overturn lower court injunctions that block enforcement of the new Title IX regulations in ten states).

[212] These comments, including one submitted by one of the authors of this Article (along with others), highlighted the extent to which menstruation-related harassment and discrimination can interfere with education. *See, e.g.*, Marcy L. Karin, Naomi Cahn, Elizabeth B. Cooper, Bridget J. Crawford, Margaret E. Johnson, & Emily Gold Watson, Comment Letter on Proposed Reguls. on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (RIN 1870-AA16) (Sept. 12, 2022), http://bit.ly/TIX-Menstruation-LawProfComment [https://perma.cc/W6RZ-S6QK].

[213] *E.g.*, *id.* at 22–25.

[214] *See* 89 Fed. Reg. at 33812–14.

[215] *Id*. at 33812 (emphasis added).

[216] *Id.* at 33813.

[217] *Id.* (discussing Petrosino v. Bell Atl., 385 F.3d 210, 215 (2d Cir. 2004)).

[218] *Id.* at 33812–13.

[219] *Id.* at 33813.

of "pregnancy or related conditions," and that further requires "reasonable modifications" to address needs related to pregnancy or related conditions.[220] This language is obviously quite similar to the PDA and PWFA, and it provides further support for the EEOC's explicit reference to menstruation in the PWFA regulations. Further, while the DOE concluded that "many, if not most, of the menstruation-related issues students and employees face will be addressed by recipients [of federal funds] in their compliance with" the general references to sex discrimination and "pregnancy or related conditions," the agency also stated at the time that it "intend[ed] to continue to study the issue" to see if "further action or clarification is required to address discrimination on the basis of menstruation."[221]

The Department of Labor (DOL) has also recently issued guidance, organized webinars, and engaged in a series of other educational activities to highlight how existing workplace labor standards and antidiscrimination laws provide menstruation-related rights and to recommend additional action to improve support for menstruators. In September 2024, for example, the Women's Bureau of the DOL published an Issue Brief to "talk" about menstruation and menopause at work.[222] The DOL's explicit goal was to help minimize the historical stigma and lack of understanding of how these biological functions impact work and to increase inclusivity and "menstruators' quality of life."[223] In so doing, the Women's Bureau recognized the importance of "basic workplace standards" related to menstruation-related accommodations, suggested specific workplace policies to address the menstrual cycle, identified gaps in existing federal law, and encouraged policymakers to codify additional provisions to support women in the workforce as they transition to menopause.[224]

This Issue Brief builds on earlier Women's Bureau work. In conjunction with a June 12, 2023 virtual roundtable on the "menopause transition" and work, the Women's Bureau also created and distributed a "Resource Guide" to participants that highlights that workers experiencing menopause may be protected under sex-based discrimination laws enforced by the EEOC and labor standards enforced by the DOL.[225] The Women's Bureau also held a virtual roundtable on menstruation at work on August 2, 2023.[226] Among other

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[220] *Id.* (referencing 34 C.F.R. § 106.2 & § 106.40(b)(3)(ii)).

[221] *Id.*

[222] Delamater & Roux, Let's Talk About It, *supra* note 31.

[223] *Id.*

[224] *Id*.

[225] U.S. Dep't of Lab. Women's Bureau, Resource Guide: Roundtable: The Menopause Transition and Work 2–4, bit.ly/DOL-MenopauseWebinar-Guide [https://perma.cc/8ZKY-WS4U]; *see also* Eleanor Delamater & Mathilde Roux, *5 Ways Employers Can Make Workplaces More Menstruation-Friendly*, U.S. Dep't of Lab. Blog (May 29, 2024), https://blog.dol.gov/2024/05/29/5-ways-employers-can-make-workplaces-more-menstruation-friendly [https://perma.cc/R24R-B73T] (linking to EEOC guidance and noting that there are protections against sex-based discrimination that may protect menstruating workers).

[226] See *Menstrual Equity and the Workplace*, U.S. Dep't of Lab. Women's Bureau (Aug. 2, 2023), https://www.dol.gov/agencies/wb/events/08022023/menstrual-equity-and-workplace [https://perma.cc/JC4T-VNQJ].

things, invited participants (including one of this Article's authors) explained menstruators' needs, workplace modifications that are useful to address those needs, and information about existing legal protections that can require such support, including protections under Title VII, as amended by the PDA, and PWFA.[227]

As of February 2025, when this Article is being finalized for publication, the guidance and regulations described in this subpart remain fully in effect. That said, immediately upon beginning his second term, President Trump issued an executive order repudiating prior agency guidance that interprets sex discrimination protections to promote what he characterized as "gender ideology," defined as replacing the "biological category of sex" with a more flexible concept of "gender identity"; the order also directed agencies to rescind "all" or "such parts" of prior guidance that are "inconsistent" with the directive.[228] It is likely that the relevant agencies will conclude that some "parts" of the EEOC's harassment guidance and guidance relating to the new Title IX regulations (interpreting the relevant laws to require support for trans- and non-binary persons) are inconsistent with the executive order.[229] However, the executive order does not discredit the agencies' conclusions regarding application of the statutory provisions to menstruation and menopause. Additionally, the executive order and other presidential actions cannot erase the underlying statutory protections against discrimination on the basis of sex, nor judicial interpretations of such statutes. Accordingly, even if the guidance or regulations are ultimately rescinded or modified, litigants may advance comparable arguments under the statutory protections directly.

IV. Towards Menstrual Justice

It is not a coincidence that workplaces are often inhospitable to menstruators and others with PWFA-covered conditions. Workplace structures are often designed around traditionally male family roles and bodies. If

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[227] *See, e.g.*, U.S. Dep't of Lab., *The Menopause Transition and Work Roundtable Event*, YouTube (June 12, 2023), https://youtu.be/FDG5Dr4GpQA [https://perma.cc/LFX3-PC75].

[228] *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 30, 2025).

[229] The EEOC's harassment guidance cannot be withdrawn or modified without a vote of the EEOC commissioners, and currently (as of February 2025) there is not a quorum for the EEOC to take such action. *See, e.g.*, Evandro Gigante, Keisha-Ann Gray, Steven J. Pearlman, Laura M. Fant, & Delia Karamouzis, *EEOC, Like NLRB, Lacks a Quorum, Stalling Rulemaking Under the New Administration*, Proskauer (Jan. 30, 2025), https://www.lawandtheworkplace.com/2025/01/eeoc-like-nlrb-lacks-quorum-stalling-rulemaking-under-new-administration/ [https://perma.cc/RQW5-88PK]. The DOE could take steps to rescind or modify some of its *guidance* related to the revised Title IX regulations. However, prior to rescinding or modifying the *regulations* themselves, the DOE would need to go through the formal notice-and-comment procedure for amending regulations.

implemented effectively, PWFA can and should provide important support for menstruation-related needs. However, framing the need to address basic aspects of the female reproductive system as "accommodations" carries with it the risk that any accommodations provided will be perceived as unwarranted "special treatment"; such beliefs could spur discrimination or harassment.[230] We provide suggestions for employers to mitigate this risk and call for strong enforcement of general workplace health laws that cover some menstruation-related (and pregnancy-related) needs. But existing laws do not fully meet menstruators' needs. These gaps in current legal protections are a significant barrier to realizing our society's commitment to ending workplace discrimination on the basis of sex. This subpart also offers suggestions for potential future research and stakeholder actions to rectify this inequity and move towards menstrual justice.

A. Best Practices for Implementing PWFA to Address Menstruation-Related Needs

PWFA makes important changes to employment law. To ensure that PWFA is implemented successfully, and to avoid potential liability, employers should train supervisors, managers, and human resources personnel to recognize and respond appropriately when workers share that they have a limitation related to pregnancy, childbirth, or related medical conditions. Employee manuals and other information provided to employees also should be revised accordingly, so that workers know they may seek support to address such needs.

PWFA-related educational materials should clearly state that menstruation-related needs may fall within the scope of the law. The application of PWFA to non-pregnant employees may not be intuitive for employers or workers, particularly because the law is titled the "Pregnant Workers Fairness Act." One easy way to address this issue is to include accommodations that are appropriate for menstruators in trainings or policies. For example, many menstrual conditions cause infertility; a training could mention that a worker can receive time off to receive necessary medical treatment for such conditions.[231] Likewise, a miscarriage can result in heavy bleeding that continues for weeks, and the first period after a miscarriage may also be long and heavy.[232] A training could explain this relationship and clarify that a worker

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[230] *See, e.g.*, Widiss, *Time Off Work for Menstruation*, *supra* note 24, at 180–84 (discussing this question and gathering sources).

[231] *Cf.* Hall v. Nalco, Co., 534 F.3d 644, 648–49 (7th Cir. 2008) (holding terminating a woman for taking time off to undergo in vitro fertilization would violate the PDA); EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES § I(A)(3)(c) (2015) (noting that gender-specific fertility treatment is a covered condition under Title VII).

[232] *See, e.g.*, Erica Cirino, *What to Know About Your First Period After a Miscarriage*, HEALTHLINE (May 22, 2019), https://www.healthline.com/health/womens-health/first-period-after-miscarriage [https://perma.cc/H9W7-ABCM].

might use PWFA to receive restroom breaks after a miscarriage to address her menstrual flow.[233] Similarly, a PWFA training could explain how pregnancy and childbirth complications may be treated with an emergency hysterectomy, which can trigger early and immediate menopause.[234] In this scenario, a worker might use PWFA to seek permission to carry a water bottle, adjust the temperature of her workspace, or access a quiet location at work to address the symptoms of menopause. Open discussion of such needs can also help destigmatize menstruation and menopause.[235]

Employers should also understand what kind of documentation requests are appropriate when workers request menstruation-related PWFA accommodations. As noted above, PWFA does not require documentation of medical needs.[236] In many instances, PWFA accommodations can, and should, be addressed through a simple conversation.[237] Even where documentation may be solicited, such requests must be "reasonable under the circumstances."[238] Where menstruation-related needs are covered by PWFA, workers should not be required to "prove" the existence of current menstrual discharge (e.g., by being required to show a supervisor a used menstrual product) to exercise their rights. Foreign case law illustrates that employers have asked for such proof to demonstrate the need for a bathroom break or to confirm coverage under menstrual leave protections; such requests clearly violate workers' dignity and cause harm.[239] Relatedly, employers should not ask employees to provide documentation of their last menstrual period,[240] and employees should not be required to provide data that may be stored in period-tracking apps or required to grant employers access to the apps directly.[241]

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[233] *See, e.g.*, 29 C.F.R. app. § 1636.3(h)(2) (example 21) (indicating that it could be impermissible retaliation under PWFA to assess penalty points pursuant to a "no fault" attendance policy against a worker who "occasionally needs time off" to address "heavy vaginal bleeding" related to delivery complications).

[234] *See supra* notes 78–80 and accompanying text.

[235] *See also* DELAMATER & ROUX, LET'S TALK ABOUT IT, *supra* note 31, at 2; Delamater & Roux, *5 Ways*, *supra* note 225.

[236] *See supra* text accompanying note 189.

[237] Some state PWFAs prohibit employers from seeking documentation for common and relatively inexpensive accommodation requests, like extra breaks. *See, e.g.*, MASS. GEN. LAWS ch. 151B, § 4(1)(E)(c). These limitations likely remain applicable in those states. *See* 42 U.S.C. § 2000gg-5(a) (providing federal PWFA does not preempt more protective state or local laws).

[238] 29 C.F.R. § 1636.3(l).

[239] Karin, *Addressing Periods*, *supra* note 24, at 451–52, 505 (providing examples of menstrual indignities at workplaces around the globe and describing litigation holding that flight attendants do not need to "prove" menstruation to be eligible for menstrual leave under South Korean law); *see also* discussion of *Flores*, *supra* note 138 and accompanying text.

[240] *Cf.* Harper v. Thiokol Chemical Corp., 619 F.2d 489, 492 (5th Cir. 1980); Raines v. U.S. Healthworks Med. Grp., 534 P. 3d 40, 42 (Cal. 2023) (offer of employment as a food service aid was terminated after the prospective employee declined to provide an answer to a pre-employment medical screening question about the date of her last menstrual period).

[241] *See, e.g.*, Margaret E. Johnson, *Menstrual Justice After* Dobbs, WISC. L. REV. (forthcoming 2025) (manuscript at 49–51) (on file with authors); Elizabeth A. Brown, *The Femtech Paradox: How Workplace Monitoring Threatens Women's Equity*, 61 JURIMETRICS

The EEOC regulations also emphasize that an employee's request for a PWFA-related need, including menstruation, is to be kept confidential, subject to the same rules that apply to medical information provided in relation to requests for accommodations for disabilities.[242] Where documentation is requested and provided, such documentation must be secured in a separate file from the employee's general personnel file.[243]

The requirement to keep medical information confidential is a baseline expectation for medical information generally; however, confidentiality concerns may be particularly heightened in this context. Menstruation and menopause remain stigmatized in our society, including through the proliferation of stereotypes that menstruators are unreasonably moody or "bitchy."[244] Reports suggest that even in countries that have mandated leave for menstruation, workers are often reluctant to claim such support because of concerns about negative treatment from coworkers or supervisors.[245] Indiscreet discussion of a worker's menstruation-related request could thus expose the worker to harassment or discrimination. This risk is even more pronounced for menstruators who do not identify as female.[246] Trans men, nonbinary, intersex, and genderqueer menstruators should be able to address menstrual needs with privacy and dignity.[247]

The connections between menstruation and pregnancy also implicate important privacy concerns. For example, an employee's request for schedule modifications to permit her to get treatment for a menstrual disorder causing infertility may signal that she is trying to become pregnant. This information may be used to subject the worker to "pre-emptive" pregnancy discrimination, akin to an employer asking a female employee if she "intends" to become

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289, 290 (2021). Employers may also have incentives to use employees' menstruation-related information to reduce healthcare and employee retention costs. *See* Johnson, *supra* at 10–17. *See generally* Michele Estrin Gilman, *Periods for Profit and the Rise of Menstrual Surveillance*, 41 COLUM. J. GENDER & L. 100 (2021) (explaining the potential impact this might have on workers' credit scores and consumer activity).

[242] *See* 29 C.F.R. app. § 1636.3(l)(4) (discussing how employers covered by PWFA are also covered by the ADA and that the ADA's requirements regarding confidentiality of medical information thus also apply to information provided pursuant to PWFA).

[243] *See* 29 C.F.R. app. § 1636.7(a)(1).

[244] *See supra* text accompanying notes 148–49.

[245] Widiss, *Time Off Work for Menstruation*, *supra* note 24, at 177; *see also* Karin, *Addressing Periods*, *supra* note 24, at 515.

[246] Karin, Johnson, & Cooper, *Menstrual Dignity and the Bar Exam*, *supra* note 24, at 7–8, 32–33, 41–42 (exploring the concern of having menstruation-related needs potentially out a bar examinee as trans and citing surveys that capture obstacles that transgender attorneys have faced that influenced some people to remain silent).

[247] It is possible that an employer might allege that it would be a substantial burden on their religious beliefs to accommodate menstruation-related needs for workers who do not identify as cis women. In this situation, employers may raise claims under the Religious Freedom Restoration Act (RFRA), which establishes a balancing test for government actions that substantially burden a person's religious exercise. *See* 42 U.S.C. § 2000bb-1. Further, if a religious employer denies accommodations on the basis of religion, PWFA, which contains a rule of construction that incorporates Title VII's exemption for religious organizations, may also offer a defense that will be evaluated on a case-by-case basis. *See* 42 U.S.C. § 2000gg-5(b) (referring to 42 U.S.C. § 2000e-1(a)).

pregnant.[248] Data related to the timing of periods, particularly any menstrual irregularities, also could be sought as evidence of an abortion, which may expose employees to criminal liability in some states.[249] These potential (unintended) consequences also might serve as a deterrent for some workers from seeking needed menstruation-related accommodations or from obtaining reproductive care.[250] A full discussion of these issues is beyond the scope of this Article. Here, we simply note that any documentation of menstruation-related requests should be kept strictly confidential and used solely for the intended accommodation purpose.[251]

B. Effective Enforcement of General Workplace Laws Addressing Health

Theorists and policymakers have long recognized that providing "special" protection for specific needs experienced by particular identity groups may spur discrimination; accordingly, some suggest that universal provisions may be preferable—albeit potentially harder to enact.[252] This tension was hotly debated in the context of maternity or parental leave. The catalyst for the Family and Medical Leave Act (FMLA) was the desire to ensure that new mothers could take maternity leave.[253] However, rather than passing a sex-specific statute (as is typical in most other countries),[254] Congress enacted the FMLA,

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[248] *See* Equal Emp. Opportunity Comm'n, EEOC-NVTA-2015-2, Questions and Answers About the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues, at Question 3 (2015).

[249] *See, e.g.*, Johnson, *supra* note 241, at 15–16, 21. The precise contours of what information prosecutors may seek to try to prove illegal abortions is both in flux and beyond the scope of this paper. Nonetheless, it is important to emphasize that employers should ensure basic confidentiality of any such information provided.

[250] *See* Raines v. U.S. Healthworks Med. Grp., 534 P.3d 40, 42 (Cal. 2023) (describing that plaintiff alleged discrimination under state law after her conditional employment offer was rescinded for her refusal to disclose her LMP information); Brown, *supra* note 241, at 290–291, 302–304, 306–311, 320–322, 328–329 (exploring the disparate impact, gender bias, and other workplace consequences of employers gaining access to workers' biometric and other health data).

[251] Johnson, *supra* note 241, at 17–18 (exploring how an employer's access to menstruation-related information can "unknowingly subordinat[e] and harm[]" employees).

[252] *See, e.g.*, Bradley A. Arehart, *Accommodating Pregnancy*, 67 Ala. L. Rev. 1125, 1127, 1129–30, 1143 (2016) (arguing against pregnancy-specific accommodations on the grounds they could spur discrimination and "paternalistic attitudes toward pregnant employees"); *see also* Widiss, Gilbert *Redux*, *supra* note 114, at 980–84 (discussing historical debates over this tension as applied to maternity leave and also labor standards such as minimum wage and required break time); *cf.* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 Ind. L.J. 1219, 1219 (2011) (arguing that universal protections can mask ongoing discrimination on the basis of sex and other protected traits).

[253] *See, e.g.*, Ronald D. Elving, Conflict and Compromise: How Congress Makes the Law 17–42 (1995) (discussing strategy and lobbying efforts to enact the FMLA and predecessor bills, such as the Parental and Disability Leave Act of 1985).

[254] *See* Deborah A. Widiss, *The Hidden Gender of Gender-Neutral Paid Parental Leave: Examining Recently-Enacted Laws in the United States and Australia*, 41 Comp. Lab. L. & Pol'y J. 723, 725–28 (2021). *See generally* Naomi Cassirer & Katherine Gilchrist, Int'l Lab. Org., Maternity and Paternity at Work: Law and Practice

which provides gender-neutral leave accessible to new parents of any sex, and also allows time off for a range of other health-related and military-related needs.[255] Many states have now passed paid family and medical leave laws that are even broader in scope.[256]

The FMLA and state analogs providing unpaid leave, as well as state laws that require *paid* leave, provide essential support for new mothers, and also for new fathers and family caregivers. The gender-neutral structure mitigates the risk of sex discrimination that would be associated with mandating that employers provide "maternity" leave only. Similarly, there are general laws addressing workplace standards and employee health needs that, if properly enforced, would meet many menstruation-related needs. Using these more general protections to achieve menstrual justice could also have the incidental—but by no means inconsequential—effect of improving workplace conditions more generally.

Most centrally, as Part II demonstrated, menstruators are often denied regular access to restroom facilities. This can cause health risks, discomfort, and embarrassment if menstrual blood leaks onto clothes[257]—and can lead to harassment, or, in rare cases, termination.[258] Notably, additional restroom breaks are *also* the most frequent request made by pregnant employees.[259] PWFA should be an important tool for addressing this problem. But regular access to the restroom is not just important for PWFA-related limitations; it is a basic human need.

Restroom access is (ostensibly) already addressed by workplace safety and health laws. The federal Occupational Safety and Health Administration (OSHA) has issued regulations and guidance specifying that workers should be permitted "to leave their work locations to use a restroom when needed" and that employers should "avoid imposing unreasonable restrictions on restroom use."[260] In an interpretation letter regarding regulations requiring employers to "provide" toilet facilities for employees, OSHA indicates that this standard is intended to ensure "employees will not suffer the adverse health

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Across the World (2014) (cataloguing family leave and related laws across the globe, including differences in maternity, paternity, nursing, and other time off protections).

[255] 29 U.S.C. § 2612(a)(1).

[256] *See, e.g.*, *Interactive Overview of Paid Family and Medical Leave Laws in the United States*, A Better Balance, https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/ [https://perma.cc/2FFP-GYNN].

[257] *See supra* text accompanying note 103.

[258] *See supra* text accompanying notes 130–35.

[259] H.R. Rep. No. 117-27, at 22 (2021) (citation omitted).

[260] *Restrooms and Sanitation Requirements*, Occupational Safety & Health Admin., https://www.osha.gov/restrooms-sanitation [https://perma.cc/5RZ4-VKDG]; 29 C.F.R. § 1910.141(c)(1)(i). Access to disposal bins that are "maintained in a sanitary condition", another element of menstrual-friendly bathrooms, is also required. 29 C.F.R. § 1910.141(a)(4)(i); *see also* All. & the Nat'l Ass'n of Women in Constr., Portable Toilet and Sanitation Best Practices for Women in Construction 2 (2015), https://nawic.org/wp-content/uploads/2023/06/Sanitation_Handout_for_Employees.pdf [https://perma.cc/G9NZ-NWEH] ("Employers should also provide . . . [t]rash cans for disposal of hand towels and feminine hygiene products.").

effects that can result if toilets are not available when employees need them."[261] The letter notes that "[i]ndividuals vary significantly in the frequency with which they need to urinate and defecate," and it explicitly identifies pregnant women as a group that typically needs more frequent access.[262] OSHA developed this guidance in part to respond to complaints from workers that they could not access restrooms frequently enough to address menstruation-related needs.[263] And OSHA has issued citations against employers when denial of restroom access "led to menstrual leaking" and the dignitary harm such leaking causes.[264]

If OSHA consistently enforced the regulations regarding restroom access, menstruating workers would not need to ask for "special" accommodations to go to the bathroom to manage menstrual flow. Rather, these employees would simply, like any worker, exercise their right to "use a restroom when needed."[265] This path towards menstrual justice would likely reduce stigma and the risk of discrimination; additionally, strengthening these universal rights would improve workplace conditions for *all* workers. Similarly, many states require regular meal breaks or rest breaks for *all* workers.[266] Again, effective enforcement of these laws could dramatically reduce the extent to which menstruating (as well as lactating or pregnant) employees need to use PWFA to ask for breaks to access food, water, or restrooms as "accommodations." Better enforcement of these universal rights would also help other workers request and obtain breaks for medical or personal reasons more easily and without additional barriers.

Certain federal, state, and local laws addressing worker health needs generally may also provide important support for menstruators. As of February 2025, twenty-one states and Washington D.C. guarantee paid sick time or paid leave that may be used to address illnesses for virtually all workers.[267] Some laws allow paid sick leave to be taken in hourly increments instead of requiring an entire day of work be missed.[268] These laws could provide occasional

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[261] Occupational Safety & Health Admin., Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities (1998).

[262] *Id.*

[263] Karin, *Addressing Periods*, *supra* note 24, at 482–84; *see generally* Marc Linder, Void Where Prohibited Revisited: The Trickle-Down Effect of OSHA's At-Will Bathroom-Break Regulation (2003) (detailing the creation of this OSHA standard and how it meets workers' needs, including references to menstruation-related needs).

[264] Karin, *Addressing Periods*, *supra* note 24, at 482–84.

[265] *Restrooms and Sanitation Requirements*, *supra* note 260; 29 C.F.R. § 1910.141(c)(1)(i).

[266] *Meal and Rest Break Laws in Employment: 50-State Survey*, Justia (Sept. 2022), https://www.justia.com/employment/employment-laws-50-state-surveys/meal-and-rest-break-laws-in-the-workplace-50-state-survey/ [https://perma.cc/YTL6-PKEW].

[267] *See, e.g.*, *Interactive Overview of Paid Sick Time Laws in the United States*, A Better Balance, https://www.abetterbalance.org/paid-sick-time-laws/ [https://perma.cc/J78B-SFQZ]; *Overview of Paid Time Off Laws in the United States,* A Better Balance (Jan. 8, 2024), https://www.abetterbalance.org/resources/overview-of-paid-time-off-laws-in-the-united-states [https://perma.cc/7ZP8-QGTN/]. Federal contractors also must provide at least 56 hours of sick leave to workers pursuant to Exec. Order 13,706, 29 C.F.R. § 13.1(b) (Sept. 7, 2015).

[268] *See, e.g.*, D.C. Code § 32–531.02; N.Y. Lab. Law § 196-B; Mass. Gen. Laws ch. 149, § 148C.

time off for menstruators (and others with limitations addressed by PWFA) if their symptoms prevent them from working.

Additionally, as discussed above, menstruators with conditions that "substantially limit[]" a major life activity may use the Americans with Disabilities Act (ADA) and its state and local analogs to ask for accommodations.[269] The federal FMLA provides unpaid leave for an employee's "serious health condition"[270]; and, as of October 2024, thirteen states and Washington D.C. provide paid leave for such conditions.[271] These laws could provide paid leave for workers who have serious menstruation-related symptoms or complications, as well as for pregnancy, childbirth, and other conditions covered by PWFA.[272]

Administrative agencies should issue guidance clarifying how the laws they enforce relate to menstruation and menopause. As noted above, the EEOC's recent PWFA regulations and harassment guidance, the DOE's revised Title IX regulations, and the DOL's Issue Brief on Menstruation and Menopause in the Workplace are important steps toward this objective. Some state and local agencies have taken similar steps. For example, the New York City Commission on Human Rights confirmed that menstruation is within the ambit of the sex discrimination laws it enforces.[273] Further public education campaigns and enforcement actions such as citations could help raise awareness about these protections and increase compliance. Finally, governments at all levels should fund such agencies to ensure they have the staff and other resources necessary to engage in such technical assistance and administrative enforcement.

C. Towards Comprehensive Legal Protections for Menstruators

Prior to PWFA's enactment, pregnant and postpartum workers who needed support at work sometimes could receive accommodations under the ADA or under the PDA's mandate to treat "pregnancy, childbirth, or related medical conditions" "the same" as other conditions that caused similar limitations.[274]

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[269] *See supra* Part II.B; *see also* 42 U.S.C. § 12102(1) (defining disability); *The ADA Project* (2019), https://www.adalawproject.org/the-definition-of-disability [https://perma.cc/HVH8-672W] (explaining the evolution of the ADA's definition of disability).

[270] 29 U.S.C. §§ 2612(a)(1)(D), 2611(11) (defining "serious health condition").

[271] *See, e.g.*, *Interactive Overview of Paid Family and Medical Leave Laws in the United States*, A Better Balance, *supra* note 256. 37 jurisdictions provide paid leave for public workers. *Map of Paid Parental & Family Caregiving Leave Policies for State Employees*, A Better Balance (Mar. 14, 2024), https://www.abetterbalance.org/resources/map-of-paid-parental-family-caregiving-leave-policies-for-state-employees/ [https://perma.cc/L7K3-4SAA].

[272] However, PWFA provides explicitly that an employer cannot require an employee to take paid or unpaid leave if a different accommodation would meet her needs. *See* 42 U.S.C. § 2000gg-1(4).

[273] *See generally* NYC Commission on Human Rights, Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions (2021) (concluding that "discrimination based on menstruation is a form of gender discrimination").

[274] *See* Young v. U.P.S., 575 U.S. 206, 229 (2015) (interpreting the PDA's same treatment language to sometimes require accommodations); Joan C. Williams, Robin Devaux,

These employees could also sometimes receive unpaid leave for serious health conditions related to pregnancy under the FMLA. But both employers and employees were confused about interactions between these laws, and this patchwork approach to pregnancy and postpartum accommodations in the workplace contained significant gaps. PWFA was enacted to provide a clear mandate that was tailored specifically for the needs of pregnant and postpartum workers.

Menstruation and menopause protections are now in a similar position—covered under a confusing jumble of laws that do not provide full support to all workers, as explained above.[275] Accommodations for menstruation-related conditions that are deemed "related to" pregnancy or childbirth are now required by PWFA.[276] If employers provide help for conditions that cause limitations like those caused by menstruation, the PDA or Title VII's more general prohibition on sex discrimination may require employers to provide the same kind of assistance for menstruation.[277] If a menstruation-related condition qualifies as a "disability" under the ADA, accommodations are required under that statute.[278] Some menstruation-related conditions might be deemed "serious health condition[s]" that qualify for protection under the FMLA or analogous state laws that provide paid medical leave.[279] People with particularly painful menstrual cramps or other severe menstrual symptoms might be able to take paid time off under a state or local paid sick leave law.[280] Discrimination or harassment on the basis of menstruation or menopause can violate sex discrimination laws, as well as age or disability discrimination laws.[281] And basic access to a restroom as needed should be covered by the OSH Act,[282] as well as state labor laws regarding breaks and restroom access. Each of these protections is important, but they fall short of meeting the full scope of menstruation-related needs. Further, none of these laws signal that menstruation and menopause are natural biological processes that workplaces should support.

Accordingly, we suggest additional legislative action will be necessary to ensure menstruation and menopause are not barriers to success at work. Lawmakers could enact explicit mandates to provide reasonable accommodations

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Danielle Fuschetti, & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 142–48 (2013) (discussing pregnancy-related conditions that could qualify as a disability); Widiss, *Federal PWFA*, *supra* note 21, at 88–95 (discussing this history and how Congress recognized PWFA was necessary to respond to the gaps in coverage under pre-existing statutes).

[275] *See supra* Parts II.B, III.B, III.C, & IV.B; *see also, e.g.*, Karin, *Addressing Periods*, *supra* note 24, at 474–510; Marcy L. Karin, *The Right to Dignified Menstruation at Work?*, HUM. RTS., Oct. 2023, at 48, 49.

[276] *See supra* Part III.B.

[277] *See supra* Part II.B.

[278] *See supra* notes 162–67 and accompanying text; Karin, *Addressing Periods*, *supra* note 24, at 477–80.

[279] 29 U.S.C. § 2612(a)(1)(D); *see* Karin, *Addressing Periods*, *supra* note 24, at 475–76.

[280] *See supra* notes 256, 267–68 and accompanying text.

[281] *See supra* Part II; Karin, *Addressing Periods*, *supra* note 24, at 491–501.

[282] *See supra* notes 260–65 and accompanying text.

for menstruation and menopause-related needs in the workplace. Any such new menstruation-specific standard also should be paired with effective enforcement of anti-discrimination and anti-retaliation protections to ensure that menstruators do not face adverse actions, harassment, or retaliation as a result of asking about or otherwise exercising their accommodation rights.[283] For example, in 2024, Washington state required employers to provide reasonable accommodations to construction workers who menstruate.[284] Specifically, construction industry employers must provide a private, accessible bathroom with a lock, free menstrual products, and adequate time to access them.[285] The law also prohibits discrimination and retaliation against workers for using these protections.[286] This new law demonstrates that statutory protections for menstruation-related time, space, and safety accommodations are possible, even if further expansion is needed to cover more industries and locations.

Alternatively, Congress, as well as additional states and localities, could require employers to provide paid breaks, paid time off, workplace flexibility options, or other accommodations for all employees; these protections would address significant menstruation-related needs without triggering the same concerns about discrimination, harassment, or backlash.[287] Indeed, governments at all levels could consider universal workplace accommodation laws, such as a reasonable accommodation mandate that would not be limited to specific health conditions or identity traits.[288] Governments can also provide paid time off without requiring workers to identify specific health needs. For example, Illinois's Paid Leave for All Workers Act authorizes paid leave for workers "to maintain their health and well-being, care for their families, or use for any other reason of their choosing."[289] Maine, Nevada, and three local jurisdictions likewise provide a general right to time off from work.[290]

The government, foundations, business associations, unions, and other stakeholders should also consider funding research into best practices for employers on these matters and analyzing which regulatory responses are most

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[283] Some other countries have enacted mandates to provide menstrual leave, and at least some companies in the United States have implemented similar policies. As one of us has written elsewhere, there is reason to fear that menstrual leave is particularly likely to trigger discrimination against menstruators, such that a universal right—like paid sick time to address short-term needs—might be preferable. *See generally* Widiss, *Time Off Work for Menstruation*, *supra* note 24. However, there are already accommodation mandates for PWFA-covered needs, religion, and disability; this might mitigate the concern that adding an accommodation mandate specifically addressing menstruation and menopause would spur backlash.

[284] *See* Wash. Rev. Code § 49.17.530.

[285] *Id.* § 49.17.530(2).

[286] *Id.* § 49.17.160.

[287] *Cf.* Widiss, *Time Off Work for Menstruation?*, *supra* note 24 (suggesting that universal paid sick time laws may be preferable to menstrual leave policies as they are less likely to cause discrimination).

[288] *See generally*, *e.g.*, Nicole B. Porter, The Workplace Reimagined: Accommodating Our Bodies and Our Lives (2023) (exploring how traditional workplace structures marginalize some workers and proposing universal accommodations to reconceptualize the workplace to better address workers' lives, bodies, and needs).

[289] *See* 820 Ill. Comp. Stat. 192/1.

[290] *See Overview of Paid Time Off Laws in the United States*, A Better Balance, *supra* note 267.

effective in supporting menstruating employees. Such research should be cross-sectional to consider the range of different workplace structures across industries and occupations, as well as the variety of lived experiences with menstruation and menopause. These studies should evaluate how class, race, disability, gender identity, age, and other characteristics may impact the efficacy of different legal requirements and employer implementation strategies.

Numerous bills have been introduced that could serve as a strong foundation for future action. At the federal level, the Menstrual Equity for All Act would require some workplaces to provide menstrual products in restrooms.[291] Among other things, the bipartisan Advancing Menopause and Mid-Life Women's Health Act would coordinate and fund occupational health research on workplace stressors that impact vasomotor symptoms and "develop evidence-informed recommendations" for interventions.[292] At a July 2024 Bipartisan Women's Caucus briefing on Menopause and Midlife Women's Health, speakers recommended the introduction of a Menopause Workers Fairness Act, modeled on PWFA.[293]

At the state level, the New York Menstrual and Menopause Act would require employers to provide workers with four days of paid time off to deal with "menstrual complications and menopause."[294] A New Jersey bill would create a decade-long "Menstrual Leave and Remote Work Pilot Program" that provides tax credits to employers who offer up to two days a month of time off or telework accommodations for "menstrual disorders" that are "severe, debilitating, and embarrassing."[295] The bill also would clarify that requesting or using accommodations would be protected activities subject to antiretaliation protections.[296] Proposed Illinois legislation would provide a tax credit to businesses with fewer than 100 employees if they spend at least $100 annually to provide free menstrual products to the public on its premises.[297]

Likewise, there are several proposed federal bills to expand general labor standards that could provide key protections for menstruators. For example, if enacted, paid time off and flexible scheduling options would be required

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[291] *See* Menstrual Equity for All Act, H.R. 3646, 118th Cong. (2023). *See also id.* § 8 (amending the OSH Act to require some employers to provide products); *id.* § 9 (requiring agencies to provide products in public restrooms); Menstrual Products in Federal Buildings Act, H.R. 2478, 117th Cong. § 2(a) (2021); Karin, *Addressing Periods*, *supra* note 24, at 511-13 (recommending labor standards and antidiscrimination provisions to cover menstruation-related needs, including by expanding 29 U.S.C. § 207 to provide time and space protections to "manage menstruation or menopause").

[292] *See* Advancing Menopause Care and Mid-Life Women's Health Act, S. 4246, 118th Cong. (2024); *see also* Menopause Research and Equity Act of 2023, H.R. 6749, 118th Cong. (2023) (requiring the National Institutes of Health to conduct research related to peri/menopause); WARM Act of 2023, H.R. 6743, 118th Cong. (2023).

[293] *Menopause and Midlife Women's Health*, Women's Cong. Pol'y Inst. (June 23, 2024), https://www.wcpinst.org/events/menopause-and-midlife-womens-health/ [https://perma.cc/D3LE-E8KR].

[294] S.B. 202A § 5, 2023-2024 Reg. Sess. (N.Y. 2023).

[295] S.B. No. 3477 (N.J. 2024).

[296] *Id.* § 1(e).

[297] H.B. No. 5248 (Ill. 2024). The credit would be for 75% of the total amount that businesses spend annually on the publicly available menstrual products up to $50,000. *Id.*

under the Healthy Families Act,[298] the Family and Medical Insurance Leave Act,[299] the Schedules that Work Act,[300] and other recently-proposed legislation. Additional states are also likely to consider paid sick days, paid family and medical leave, and other such general legislation.[301]

A full discussion of the political and practical pros and cons of these different approaches to addressing menstruation-related needs is beyond the scope of this Article. Our goal here is simply to highlight that further action is necessary to ensure menstrual justice at work. Menstruators should be able to participate fully in the workplace, and they should not face discrimination or harassment for asking for the support they need to address these basic biological functions, including as they change over a life course.

VI. Conclusion

Even though roughly half of the workforce menstruates, experiences perimenopause, and ultimately enters menopause, workplaces are often inhospitable to menstruation-related needs. The recently-enacted Pregnant Workers Fairness Act can help address this inequity. Under PWFA, workers should be able to receive accommodations for some key menstrual needs, such as time off to seek medical treatment for disorders that may cause infertility, or accommodations to address menopausal symptoms brought on by a hysterectomy after childbirth complications. Effective enforcement of general workplace health laws can help ensure that menstruators receive other basic supports, such as prompt access to a menstrual-friendly restroom when needed. Normalizing menstruation-related accommodations can also help destigmatize gynecological conditions, thereby reducing discrimination and harassment related to menstruation. The PWFA regulations' explicit recognition that menstruation-related needs that have a nexus to pregnancy or childbirth are within the ambit of the statute is an important step forward. However, additional legal reform—accompanied by consistent enforcement, funding, and oversight—is necessary to ensure that menstruators have the full range of workplace supports they may need to handle periods, and the transition to menopause, with dignity.

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[298] Healthy Families Act, S. 1664 / H.R. 3409 (118th Cong. 2023).
[299] FAMILY Act, S. 1714 / H.R. 3481 (118th Cong. 2023).
[300] Schedules That Work Act, S. 2851 / H.R. 5563 (118th Cong. 2023).
[301] *See, e.g.*, H.B. 256 (Va. 2024); H.B. 18 (Pa. 2023–2024 session).